JAMES D. MAHER,
Clerk.

IN THE

Supreme Court

OF THE

United States.

OCTOBER TERM, 1918
No. 598

BUTTE & SUPERIOR COPPER MINING COMPANY, *Limited*, a corporation,
(Defendant) Appellant,
against
CLARK-MONTANA REALTY COMPANY, a corporation, and ELM ORLU MINING COMPANY, a corporation,
(Plaintiffs) Appellees.

Brief of Appellees on Merits.

JOHN P. GRAY,
W. A. CLARK, JR.,
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Counsel for Appellees.

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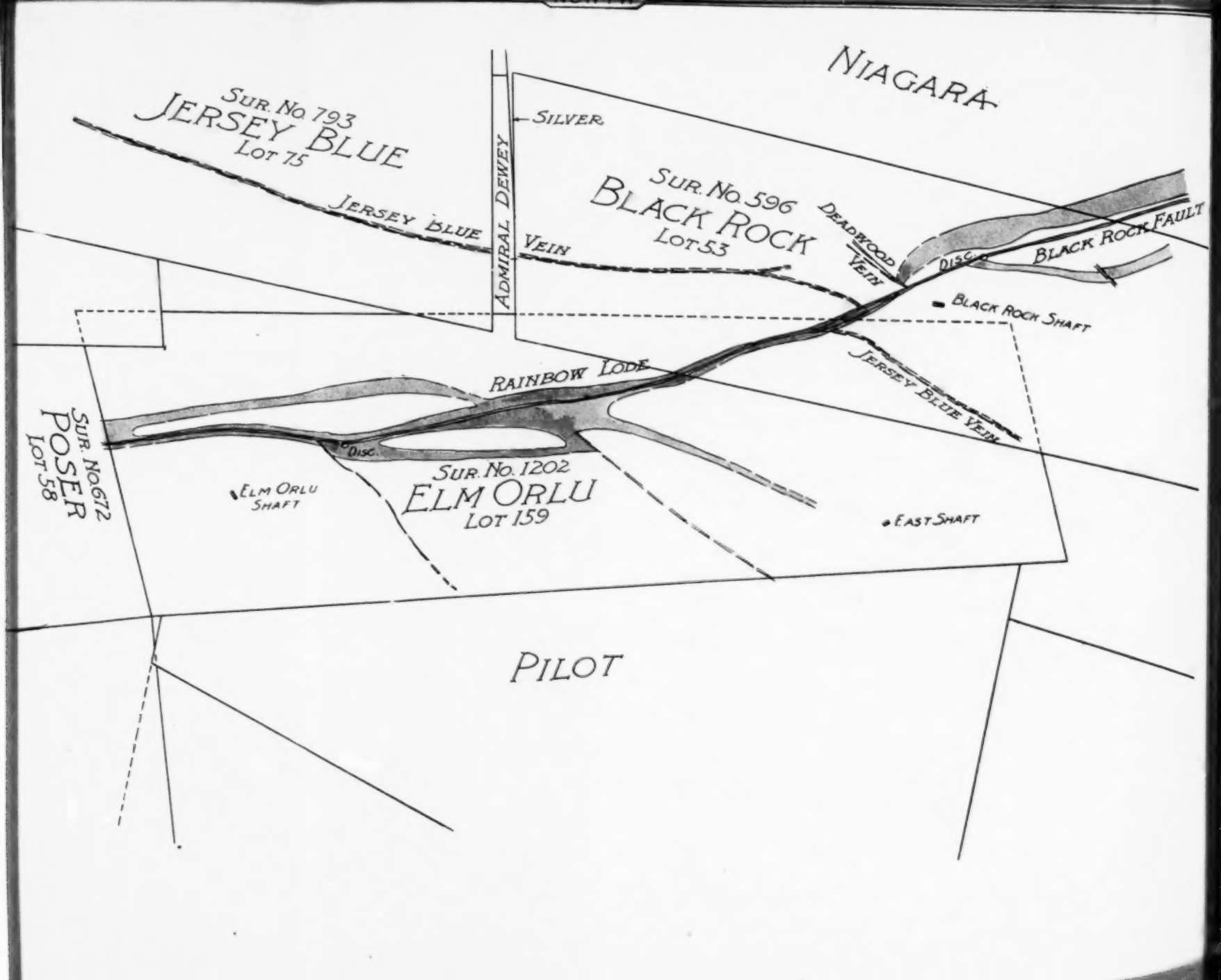
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PILOT

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(Defendant) Appellant,
against
CLARK-MONTANA REALTY COMPANY, a corporation, and ELM ORLU MINING COMPANY, a corporation,
(Plaintiffs) Appellees.

FACTS.

Clark-Montana Realty Company is the owner and Elm Orlu Mining Company the lessee of the Elm Orlu lode claim situated at Butte, Montana. Appellant owns the Black Rock, Jersey Blue, Admiral Dewey and Silver claims. The accompanying diagram shows the relative location of the claims:

The suit was one to quiet title and for an accounting for ores.

THE COMPLAINT.

The allegations of the Complaint are analyzed in the brief in support of the motion to dismiss, heretofore filed. In substance the Complaint asserted the discovery and location of the Elm Orlu claim April 18, 1875; the recording of the declaratory statement on April 22, 1875; its continuous and uninterrupted adverse possession by the locators and their successors down to the date of patent; that patent was issued based upon the location of April 18, 1875, and the declaratory statement recorded on April 22nd of that year; that the Black Rock claim was located several months subsequent to the location of the Elm Orlu. The two location notices are attached to the Complaint as exhibits. The substance of the allegations with reference to the locating, holding and patenting of the claims is an assertion by appellees of priority of location.

The bill alleged that within the Elm Orlu claim is a vein known as the Rainbow vein, the discovery vein of the Elm Orlu, which at its apex crosses the west end line of the claim and thence proceeds in an easterly direction through the claim; that on its course easterly the vein forks and one fork at its apex crosses the east end line of the Elm Orlu at a point south of the south line of the Black Rock, the other fork crosses the south boundary of the Black Rock about 350 feet east of the southwest corner of the Black Rock and continues northerly until it crosses the north side line of the Black Rock claim; that the vein dips north and on its downward course extends beneath the appellant's claims. The northerly strand or fork is through-

out the trial and in the opinion of the court referred to as the "Rainbow", and the southerly fork or strand as the "Pyle".

It is alleged that between August 18, 1906, and December 8, 1913, the appellant, Clark-Montana Realty Company, was the owner of an undivided one-half interest in the Elm Orlu claim and W. A. Clark, Jr., was the owner of the remaining half interest; that since the last named date the Clark-Montana Realty Company has been the sole owner thereof.

The bill further contained a charge that while the Clark-Montana Realty Company and W. A. Clark, Jr., were the owners of the Elm Orlu claim, and also since December 8, 1913, while the Realty company was the sole owner of the claim, the defendant by means of secret underground workings in its exclusive possession and control, wilfully had penetrated into parts of the Rainbow lode between planes drawn downward vertically through the end lines of the Elm Orlu claim and such planes extended northerly in their own direction and beneath the surface of both the Elm Orlu and the Black Rock claims, and had removed ores belonging to the plaintiffs from beneath the surface of both said Black Rock and Elm Orlu claims, and unless enjoined, would continue so to do.

The bill further alleged that the defendant was the owner of the Black Rock, Jersey Blue, Admiral Dewey and Silver lode claims; alleged that the defendant claimed an estate or interest adverse to the plaintiffs' in or to the Elm Orlu lode mining claim and in or to the vein or lode referred to as the Rainbow lode, and in or to that part of the Rainbow lode which lies between vertical planes drawn downward through the end lines of the Elm Orlu lode claim and said end lines extended northerly in their own direction, the exact

nature of which claims was unknown to the plaintiffs.

Plaintiffs further alleged that all of said claims of the defendant were false and groundless and a cloud upon plaintiffs' title; that the said claims were without right and that the defendant had no right, title or interest whatever in or to the Rainbow lode, or any part thereof, between said planes above described.

The prayer was that the defendant should be required to set forth the nature of its claim; that all adverse claims might be determined; that the title of the plaintiffs be quieted and the defendant be required to account for the ore by it unlawfully removed.

THE ANSWER.

The answer admitted the recording of the declaratory statement of the Elm Orlu April 22, 1875, and that patent for the claim was based thereon. It, however, asserted that the Black Rock was prior because first patented and that the Elm Orlu claim, though first located, could not claim rights prior to its entry for United States patent by reason of a defective verification in the original statement filed for record.

The answer also asserted that the discovery vein of the Elm Orlu crossed the side lines of the Elm Orlu claim (this was afterward abandoned); admitted that there was a vein crossing the west end line of the Elm Orlu, but that it continued only 305 feet easterly thereof.

The answer also asserted an estoppel against the plaintiffs, based upon a deed executed by the Clark-Montana Realty Company, conveying a quarter interest in the Black Rock lode claim, which it was asserted

precluded it from asserting any right to any vein apexing in the Elm Orlu and extending into the Black Rock or apexing in the Black Rock and extending into the Elm Orlu.

Affirmatively, and in the nature of a cross suit, defendant asserted its ownership of the Black Rock claim, claiming nothing on behalf of it prior to the date of its entry for United States patent; charged that there was a vein within the Black Rock crossing its westerly end line at its apex and continuing easterly between the side lines of the claim for a distance of 818 feet, where it forked upon its course, one branch continuing easterly to the east end line and the other crossing the north side line of the claim; that it dipped southerly and beneath the surface of the Elm Orlu; charged the plaintiffs with removing ore therefrom and asked that its title be quieted thereto and for an accounting.

In so far as the Jersey Blue, Silver and Admiral Dewey claims were concerned, the defendant relied solely upon denials. It asserted no mining rights by virtue of the ownership of said claims.

THE FINDINGS OF FACT.

The trial court made certain specific findings of fact and conclusions of law in addition to its opinion, which findings of fact and conclusions of law are found at pages 33 and 34 of the record.

The appellant in the Circuit Court of Appeals made several assignments of error to the findings of fact. None of those assignments was sustained in the Cirsuit Court of Appeals. The court in the opinion, disposing of those questions, used the following language:

"The appellant does not assert that the findings of fact are unsupported by competent evidence, but contends that they are contrary to the weight of the evidence. The trial court made its findings after an evidently careful and painstaking investigation of the testimony and the exhibits, and after a personal inspection of the mining properties. We have examined the record sufficiently to see that the findings are all supported by the credible testimony of reputable witnesses. Upon settled principles which this court has always recognized, findings so made upon conflicting testimony are conclusive upon this appeal." (R. p. 906.)

We deem it unnecessary to cite authorities to the effect that where the two courts below have agreed upon the facts, this court will not re-examine any question of fact where there is testimony to support the finding.

JURISDICTION.

The court is without jurisdiction in this case for the reason that no federal question was or is presented by the bill of complaint.

This question is presented and discussed in the brief in support of the motion to dismiss and supplemental and reply brief of appellees upon such motion.

ARGUMENT ON MERITS.

If the court should decide that it possesses jurisdiction of this controversy, the record will compel an affirmance of the judgments of the courts below.

The assignments of error are forty-two in number, Assignments 11, 12, 13, 14, 16, 20, 22, 35, 38, 39 and

40, eleven in number, are directed to the findings of fact. The balance are most of them very general and repetitive, and by reason both of number and character it becomes almost impossible to specifically brief each assignment of error. We deem it proper, therefore, to present in the argument a discussion of those questions of law which have been urged by appellant in the courts below and which are the only questions raised in the courts below, which under any circumstances could properly come before this court for review.

I.

THE ELM ORLU HAS PRIORITY OVER THE BLACK ROCK.

Both of the courts below have determined as a fact that the Elm Orlu was first discovered and first located. That the Elm Orlu was first discovered and first located was not disputed at the trial. The Elm Orlu discovery and location were made April 18, 1875, and the declaratory statement filed for record April 22, 1875. The Black Rock discovery and location was not made until the following fall, November 6, 1875, and the declaratory statement recorded November 13th.

Appellant seeks to avoid the consequences of such actual priority because of an alleged defect in the verification of the recorded declaratory statement of the Elm Orlu (which alleged defect was also in the declaratory statement of the Black Rock), and asserts the rights must date from the relative dates of entry for United States patent. (The Black Rock was first entered for patent.)

The courts below have both found as facts that the locations were made as above stated; and also that the

locators of the Black Rock had actual knowledge of the location of the Elm Orlu at the time of the Black Rock location.

Perhaps it would be sufficient here to leave the matter entirely without discussion of the facts and present only the question of law as to the verfication attached to the original location certificate of the Elm Orlu, but it may be of assistance to the court in a clear understanding of the facts that the evidence be briefly referred to.

Concerning the location of the Elm Orlu the record is:

(1) The complaint alleged the location April 18, 1875, (Pr. IV and V.); the marking of the boundaries and the recording of the declaratory statement (Par. VII), and attached a copy of the notice to the complaint (Ex. A. R. p. 10); in 1882 the then owners of the claim filed application for patent and therein recited the facts with reference to discovery and location of their claim, and filed a copy of the declaratory statement of April 1875, with said application (Par. XI); the officers of the United States accepted said proof of discovery and location and said declaratory statement, and entry of said claim was allowed upon said proof; a receiver's certificate and subsequently patent of the United States issued therefor. (Par. XII.)

(2) The answer admitted that the location notice of April 18, 1875, attached to the complaint was recorded on April 22, 1875 (Par. VI); admitted that in 1882 the then owners of the Elm Orlu filed in the United States Land Office their application for patent and filed therewith a copy of the declaratory statement of which Exhibit A, attached to the bill, was a copy (Par. X). The answer denied any discovery within the limits of the Elm Orlu prior to the filing of said

notice for record; denied the marking of the claim upon the ground (Par. VI), and further alleged that the location certificate was void because of an alleged defective verification (Par. VI); alleges affirmatively that in the patent proceedings and in all proceedings in the United States Land Office and the General Land Office, the right to patent for the Elm Orlu was based upon the notice of location and declaratory statement so made, posted and filed by the predecessors in interest of plaintiff. (Par. VII).

(3) The evidence. In addition to the admissions, the location of the Elm Orlu is shown:

(a) By the recorded location certificate;

(b) That it was actually located, marked upon the ground and well known by proof that the locators of the Poser claim, located May 1, 1875, recognized the Elm Orlu in the declaratory statement of the Poser (R. pp. 118-19; Pltfs. Ex 1). The Poser declaratory statement placed its east end line along the west end line of the Elm Orlu. As far as actual monuments are concerned, even heresay evidence is received and weighed and the Poser declaratory statement was competent evidence that the Elm Orlu was marked and monumented upon the ground.

Ayers v. Watson, 137 U. S. 584.

It is to be borne in mind that between the date of the location of the Elm Orlu and the trial of this case over forty years had elapsed, and all of the original locators of the Elm Orlu were dead. (R. p. 134.)

(c) The testimony of General Charles S. Warren (R. pp. 108-112). General Warren was interested in the Black Rock claim from its location, through his name did not appear in the declaratory statement. The claim

was actually located by his partner Belk, who later executed a deed to Warren conveying him his interest.

Within five days after the Black Rock discovery (p. 111) General Warren went to the claim with Belk and in going there passed over the Elm Orlu claim, which Belk told him at that time belonged to McNamee, Savage and Burkett. General Warren testified that during that fall he went by the Elm Orlu discovery, broke up some rock and looked at it; there was an opening eight or ten feet deep at the discovery. He testified that the Elm Orlu was first located, and in reference to the monuments, he remembered positively the northeast corner stake.

This uncontradicted testimony establishes the fact that Belk, the actual locator of the Black Rock, and his partner Warren had actual notice of the location of the Elm Orlu.

(d) The testimony of William Parks. Parks became interested in the Elm Orlu in 1876; the record title did not pass to him until some years after. He saw the ground in 1875 while prospecting; he went by the Elm Orlu, saw the discovery and at least one stake, His testimony shows that there was a discovery of a vein of mineral bearing rock at the location point of the Elm Orlu in 1875 (R. p. 94).

(e) The piont of discovery upon the Elm Orlu shows that the discovery was made upon the prominent outcropping Rainbow lode 40 or 50 feet wide at that point.

The above evidence was not controverted. We may, therefore, assert that the record without contradiction shows:

(1) That at the date of its location there was a discovery within the Elm Orlu of a vein of mineral bear-

ing rock in place, one of the great veins of the Butte camp.

(2) That the claim was marked upon the surface.

(3) That the locators of the Black Rock had actual notice of its location.

In addition to the facts, after all of these years, the declaratory statement creates a presumption of discovery of mineral and a valid location.

Vogel v. Warsing, 146 Fed. 949.

(4) The findings of the courts on priority.

The trial court found "That the Elm Orlu claim was located before the Black Rock claim was located" (R. p. 33). That finding was approved by the Circuit Court of Appeals and the facts are by that court stated as follows:

> "Discovery and location was made of the Elm Orlu claim on April 18, 1875, and the declaratory statement of the locators was recorded on April 22, 1875, and continuous possession was had by the locators and their successors down to January 1, 1884, the date of the issuance of the patent, for which final entry had been made on February 20, 1882. The Black Rock claim was located November 6, 1875, and the declaratory statement was recorded a week later. Patent was issued on February 15, 1882, final entry having been made on November 24, 1880." (R. p. 901).

Notwithstanding that the location of the Elm Orlu was prior to that of the Black Rock, the appellant con-

tended that the mining rights of the parties are fixed and determined by the dates of the entry of the claims for United States patent, for the reason that the location notices or declaratory statements of both claims failed to comply with the statutes of Montana in effect at the dates of their locations. This defect complained of was that the verification attached to the declaratory statement was defective. The Montana statute in question is as follows:

> "Any person or persons who shall hereafter discover any mining claim upon any vein or lode containing gold, silver, cinnabar, lead, tin, copper or other valuable deposits, shall within twenty days thereafter make and file for record, in the office of the Recorder of the County in which said discovery is made, a declaratory statement in writing, on oath, before some person authorized by law to administer oaths, describing such location in the manner provided by the laws of the United States." (Laws Montana, 1873, Extra Session, p. 83.)

Appellant contends that no rights could attach to the location of the Elm Orlu because of such alleged defective verification to the declaratory statement, however long or however strong may have been the assertion of right thereunder and irrespective of the actual notice and knowledge which the locators of the Black Rock had of the Elm Orlu location.

Under the decisions of the Supreme Court of Montana rendered many years after the location of both the Elm Orlu and the Black Rock, and after the issuance of patent to both claims by the United States, a verification similar to that on the Elm Orlu state-

ment was held not to be in compliance with the Montana statute and invalid.

McBurney v. Berry (1885), 5 Mont. 300.

O'Donnell v. Glenn (1888), 8 Mont. 248.

Later in

Hickey v. Anaconda Copper M. Co. (1905), 33 Mont. 46.

the same court held such a location void.

At the first session of the Montana legislature following the decision in the Hickey case, a statute was passed entirely changing the rule there announced; providing that the recording of a certificate of location is constructive notice only; that a certified copy thereof is evidence of all facts properly recited in the certificate of location, and that no defect is material save in favor of subsequent locators, in good faith and without notice (Laws Montana, 1907, 10th Sess. Ch. 16, Sec. 11) (Sec. 2293, Rev. Codes Montana, 1907.) The section is set out in full hereafter.

The district court held that the rights of the parties having become vested and fixed prior to the announcement of any such rule by the Montana Supreme Court, it was the right of the parties to have and the duty of the court to exercise its independent judgment upon the validity and effect of the declaratory statements and locations, and though for comity and to avoid confusion the court leans to agreement with the state tribunal, if in its judgment, the state rule of decision is unsound, it must refuse to follow it, citing *Kuhn v. Coal Co.* 215 U. S. 349.

Nothing can be added to the logical statement by the court of the grounds upon which the claim to priority of the Elm Orlu location was upheld.

Judge Bourquin in the District Court disposes of the contention of appellant as follows:

> "A location and its record are different things. The Federal and most state statutes distinguish between them, the former even in authorizing local rules 'governing the location' and 'manner of recording'. The statutory object is to protect and reward discoveries of mines. Discovery with intent to claim is the principal thing, and vests an estate—an immediate fixed right of present and exclusive enjoyment in the discoverer. The record is incidental machinery to secure to the discoverer his reward and to give notice to others. The spirit of all recordation acts is notice to protect others against secret equities. If the record is not necessary to create the estate (as it is in the matter of homestead exemptions and mechanics' liens), the statute providing for recording is but a direction to do certain acts and does not create conditions-subsequent; and if the statute provides no forfeiture for failure to record, by failure the estate is not divested. Recordation of mining locations can not be a condition-precedent, for the estate arises before recordation is to be performed.
>
> If the Montana statute made recording of the nature of conditions-subsequent (of feudal origin), at common law such conditions are to be but substantially performed, and no assignee of part of the premises to which the conditions attach can take advantage of their breach; and the owners of the Blackrock securing the conflict area were at most assignees of but part of the Elm Orlu premises. The United States forfeited

neither claim for defective verification—if a breach of condition-subsequent. The estate in neither, if voidable, was avoided. Both were confirmed and patented. Where Congress intended forfeiture of mining and other public land claims for breach of conditions-subsequent it plainly said so; vide forfeiture for failure to perform or contribute to annual labor. Recording acts that expressly provide forfeiture for failure to comply with them do so in favor of only subsequent bona fide claimants. Forfeitures are odious and not to be implied. Prior to patent entry of these claims, a Montana statute provided that all ambiguous statutes should be construed 'in favor of natural right'; and it would not have been too far-fetched to apply it to the statute directing recordation of mining claims. In 1875 Montana was indeed primitive. Those learned in the law were few. It is doubtful if there was a lawyer in Butte. The prospectors, pioneers and founders of this wonderful West, seeking in good faith to comply with the recordation law, for mere technical failures therein should not have been subjected to so harsh a construction of that statute and deprived, as many of them were, of their discoveries. And deprived for whom? Subsequent bona fide discoverers and locators? No: as a rule for those unspeakable creatures who search public records to discover and take advantage of defects in their neighbors' titles.

These statutes are of no more force and effect than miners' rules. Both are authorized by the one Federal statute. The better if not prevailing rule always has been that if the recordation law does not expressly provide forfeiture for failure to record, the location is valid though not recorded. That is the rule of this Circuit. *Last Chance Mining Co. v. Bunker Hill Mining Co.*, 131 Fed. 586.

In *Yosemite Mining Co. v. Emerson,* 208 U. S. 30, the Supreme Court held that one with knowledge of the existence of a mining location, could not take advantage of the locators' failure to post two notices required by local rule, he having posted but one, the rule not providing for forfeiture, in that he had all the information the notice was designed to give; and that to hold that the failure to post the second notice 'would work a forfeiture, would be to permit the rule to work injustice and to subvert the very purpose for which it was enacted.'

True, the posted notice is temporary, and the recorded one permanent. But the principal is the same, viz., that the failure to comply with local rules or statutes that do not prescribe forfeiture as a consequence, is immaterial so far as those with knowledge of the locations are concerned. If one such statutory requirement does not imply forfeiture for failure, why should another? If in the case cited partial failure was not fatal, why should it be in the case at bar? No reason appears why the rule of the Yosemite case does not control this at bar. The State rule of decision, now set aside by statute, does not commend itself as sound and can not be followed here." (R. pp. 41-42.)

The Circuit Court of Appeals approves of the conclusion of the court below and uses the following language:

"It is true that the Montana courts so held, but in view of the harshness of the rule so established, the Legislature at its session next following the decision in the Hickey case enacted that the issuance of a patent for a mining claim shall be deemed conclusive that the requirements of the laws of the state relative to location and record have been duly complied with, and it validated all mining locations under the laws of the state 'here-

tofore made that in any respect have failed to conform to the requirements of such laws, except as against one who has located the same ground in good faith and without notice.' The court below declined to follow the rule of the Montana decisions, for the reason that the locations of the parties to the present suit had been made prior to the date of those decisions, and they were therefore not binding upon a Federal Court, and for the further reason that the Montana statute had not provided that failure to record a notice which complied in all respects with the statute of the territory should work a forfeiture of a claim, the court holding that the better rule has always been that if the recordation law does not expressly provide for a forfeiture for failure to record, the location is valid though not recorded, citing *Last Chance M. Co. v. Bunker Hill & S. M. Co.*, 131 Fed. 586, and *Yosemite Mining Co. v. Emerson*, 208 U. S. 25. In so holding we think the court below committed no error." (R. p. 902.)

Both courts cited with approvel the case of

Yosemite Min. Co. v. Emerson, 208 U. S. 25.

where this court held that one with knowledge of the existence of a mining claim could not take advantage of the locator's failure to post two notices required by local rules, he having posted but one, the rule not providing for forfeiture, for the second locator had all the information the notice was designed to give.

The principle of the Yosemite case is exactly applicable as between the Elm Orlu and the Black Rock claims. The locators of the Black Rock had actual notice of the existence of the Elm Orlu location. (Test. Gen. Warren, R. pp. 109-111). In that case, this court said:

> "To hold that the want of notice under such circumstances would work a forfeiture would be to permit the rule to work gross injustice and to subvert the very purpose for which it was enacted."

II.

ANY INVALIDITY IN THE ORIGINAL CERTIFICATE OF LOCATION WAS CURED BY THE ISSUANCE OF UNITED STATES PATENT.

The Circuit Court of Appeals held that "if there was invalidity in the original certificate of location of the Elm Orlu lode claim, it was cured by the issuance of the patent." The decision of the court upon this question is found in the opinion at pages 902 and 903 of the record.

In *Steel v. St. Louis Smelting & Refining Co.,* 106 U. S. 447, Justice Field speaking of the action of the Land Department in issuing a patent said.

> "Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation."

In

> *Creede & Cripple Creek Mining Co. v. Uinta Tunnel Co.,* 196 U. S. 337.

it is expressly held that the patent is a conclusive adjudication that the provisions of the state statutes with

reference to the recording of a declaratory statement or location certificate have been complied with.

Justice Brewer, after reciting the provisions of the Colorado statute with reference to location, including the provision for the filing of a location certificate and describing its contents, says:

> "The issue of a patent for a lode claim in Colorado is therefore not only a conclusive adjudication of the fact of the discovery of the mineral vein, but also of compliance with these several provisions of its statutes.

In

Lawson v. United States Min. Co., 207 U. S. 1.

it was contended that there was no evidence of the valid location of the Old Jordan and Mountain Gem claims prior to the entries of the Ashland and Kempton. The location notices of the Old Jordon and Mountain Gem were admitted in evidence and were long prior to the locations of the Ashland and Kempton. The court in disposing of the contention said:

> "It is further contended that the locations of the 'Old Jordan' and Mountain Gem were anterior to the act of July 26, 1866 * ** , which was the first legislation of Congress in respect to the granting of mineral claims, and that while that act, in its second section, recognizes the rights of locators in so far as they have proceeded according to the local custom or rules of miners of the district in which the mines are situated, yet in this case there is no evidence that these

> locations were made in conformity to any such local custom or rules. It is sufficient to say that by stipulation of counsel it was agreed that the patents to the 'Old Jordan' and Mountain Gem were issued upon the location notices. Inasmuch as they were accepted by the Government, and patents issued thereon, it was a recognition by the department of the conformity of the proceedings to the local rules and customs of the district, and such ruling is not open to challenge by third parties claiming rights arising subsequently to such notice. * * *
>
> Acceptance by the Government of location proceedings had before the statute of 1866, and issue of a patent thereon is evidence that those location proceedings were in accordance with the rules and customs of the local mining district."

The patent record of the Elm Orlu claim (Plft's Ex. 61) shows that the application for patent for the Elm Orlu was founded upon the declaratory statement of April 18, 1875, and upon no other location notice. Indeed, the answer of appellant itself (Par. VII) expressly alleges that "in the proceedings instituted by the claimed locators of the Elm Orlu lode claim and predecessors in interest of the plaintiffs, in the United States Land Office, for patent to said claim, and in all proceedings taken before the General Land Office, the right to patent therefor was based upon the alleged notice of location and alleged declaratory statement made, posted and filed by such claimed locators and predecessors in interest of the plaintiffs". (R. p. 17.) Judge Bourquin in his opinion in the District Court, referring to this question, says:

> "Defendant admitting that the exhibit to the complaint is the Elm Orlu declaratory statement, that none other was recorded, that all Elm Orlu patent proceedings were based thereon, of necessity in substance admits the Elm Orlu patent issued upon said declaratory statement and invokes the principle of the Lawson Case against itself. And the facts were also proven—as potent as stipulation or other admissions." (R. p. 43.)

These facts bring this case squarely within the rule announced in

Lawson v. United States Min. Co., 207 U. S. 1.

In

El Paso Brick Co. v. McKnight, 233 U. S. 250.

the same effect was given to the certificate of entry as in the other case had been given to the patent itself. The opinion says:

> "The entry by the local land officer issuing the final receipt was in the nature of a judgment in rem (*Wight v. Dubois*, 21 Fed. Rep. 693) *and determined that the Brick Company's original locations were valid*, and that everything necessary to keep them in force, including the annual assessment work had been done." (The italics are ours.)

The same doctrine is announced in:

Stewart M. Co. v. Bourne, 218 Fed. 327 (C. C. A.)
Doe v. Waterloo M. Co., 54 Fed. 935-940.
Galbraith v. Shasta Iron Co., 143 Cal. 94.
Lindley on Mines, Sec. 777.

The Supreme Sourt of Montana frequently and for many years gave its support to this doctrine. In the *Butte City Smoke House* cases, 6 Mont., 397, at page 409 the court said:

> "And so the Smoke House patent was itself evidence that, in the discovery, the location of the claim, and in all proceedings up to the issuance of the patent, the law had been complied with."

In

Talbott v. King, 6 Mont. 76

at page 103 the court said:

> "All these matters pertaining to the issuance of a patent for a mining claim—the discovery and location; the marking and bounding, so that the claim may be identified and its lines readily traced; the notice, and the work and labor to be performed—are all matters that came before the land department, and are conclusively adjudicated therein. That department supervises the issuances of the patent. It is a special tribunal created for that purpose, and, within the scope of its jurisdiction, its adjudications are final and conclusive. Before a mining claim patent can issue it must be established in the land department by competent evidence that there has been a discovery within the boundaries of the claim, *and a notice and location according to law;* that the necessary work has been done; and that all preliminary and precedent acts have been performed, which authoritzes and justify the issuance of the patent." (The italics are ours.)

The same question was presented in

Chambers v. Jones, 17 Mont. 156-163

where the court, after referring to the earlier cases, says:

"This question, therefore, seems to be at rest."

The only authority out of harmony with this great weight of authority is a later decision by the Supreme Court of Montana.

Hickey v. Anaconda Copper M. Co., 33 Mont. 46.

Without referring to the earlier Montana cases the court held that the patent was not conclusive of the fact that a declaratory statement in due form of law was filed for record. This rule remained the law in Montana for less than two years. It so threatened supposedly established rights that the ensuing Montana legislature provided:

> "The issuance of a United States patent for a mining claim shall be deemed conclusive that the requirements of the laws of this state, relative to the location and record of such mining claim, have been duly complied with; PROVIDED, HOWEVER, that where questions of priority are involved the date of the location shall be an issuable fact where it is claimed to have been prior to the date of the record of the location."

Section 2294 Revised Codes of Montana.

It is urged that this statute cannot apply to a patent issued prior to the enactment of the statute on the theory that it is a curative act. The section simply provides a rule of evidence in Montana and provides what effect shall be given to a patent of the United States for a mining claim. As such, it is applicable to claims located before as well as subsequent to the date of the act.

Before the mining patent could issue it was necessary to establish in the Land Department by competent evidence that "there had been a notice and location according to law." The issuance of the patent was an adjudication of the tribunal having jurisdiction of the validity of such declaratory statement.

The Circuit Court of Appeals in this case, discussing the Hickey case, says:

> "In brief, the court held that the issuance of the patent was an adjudication only of compliance with the laws of the United States, and not of compliance with the laws of the state. The case stands alone in so holding. The reverse was held, as we have seen, in *Mining Co. v. Tunnel Co., supra.*" (196 U. S. 337). (R. p. 903.)

III.

ANY DEFECT IN THE ORIGINAL CERTIFICATE HAS BEEN CURED BY MONTANA STATUTES.

The Circuit Court of Appeals also held that any defect in the recorded location certificate of the Elm Orlu claim was cured by Montana legislative enactment.

The Hickey case was decided in the summer of 1905. The next legislature of the State of Montana advised of the results which the rule of the decision of the Supreme Court of the State was working upon prospectors and miners, who had in good faith long possessed and held their mining claims, and for the purpose of fixing priority where it actually was, enacted a new statute, three sections of which are now found in the *Revised Codes of Montana,* 1907, as Sections 2292, 2293 and 2294, as follows:

> 2292: "Validating locations heretofore made. —All mining locations, made and recorded under the laws of this state, heretofore in force, that in any respect have failed to conform to the requirements of such laws, shall, nevertheless, in the absence of the rights of third persons accruing prior to the passage of this Act, be valid if the making and recording of such locations conform to the requirements of this Act. (Act approved February 18, 1907, Sec. 10) (10th Sess. Chap. 16.)"
>
> 2293: "Defective locations good against persons with notice.—The period of time, prescribed by this law for the performance of any act, shall not be deemed mandatory where the act is performed before the rights of third persons have intervened, and no defect in the posted notice or recorded certificate, shall be deemed material, except as against one who has located the same ground, or some portion thereof, in good faith and without notice. Notice to an agent, who makes a location in behalf of another, shall be deemed notice to his principal, and notice to one of several co-claimants shall be deemed notice to all. (Act approved February 18, 1907, Sec. 11) (10th Sess. Chap. 16)."
>
> 2294, *supra.*

Where there is no equity in claiming a right based upon an informality in a legal document or muniment of title, in a case where the legislature has provided that something should be done which is not done, and which it would not be necessary to do had the legislature not so provided, the legislature has the right by subsequent enactment to cure such informality, providing there is no vested right in a person claiming against such document which is interfered with by the curative act. Such a statute does not interfere with or take away vested rights. As clear a decision upon this question as can be found is that of the Supreme Court of Montana in

Mutual Benefit Life Ins. Co. v. Winne, 20 Mont. 20

To the same effect are:

McFadden v. Evans S. B. Co., 185 U. S. 505;
Downs v. Blount et al, 170 Fed. 15;
Cooley Constitutional Limitations, 7th Ed. pp. 528-531.

With actual notice of the Elm Orlu location, it indeed requires bravery to assert that a statute curing a defect in its recorded certificate affected the substantial equities of the Black Rock locators or owners.

It is urged that Sections 2292 and 2293 cannot validate locations made prior to that date because of Section 6213 of the Revised Codes of Montana, providing that no part of the Codes is retroactive unless expressly so declared, but in the codes enacted it will

be found that these sections contain the heading:

> "2292: Validating locations heretofore made."
>
> "2293 Defective locations good against persons with notice."

The Supreme Court of Montana in

> *Con. Gold & Sapphire M. Co. v. Struthers,* 41 Mont. 565.

on pages 574 and 575 applies the act and Section 2293 thereof to a location made prior to the enactment of the statute. The Supreme Court of that state, therefore, construing this statute of the state has held it to be a curative act.

IV.

THE APPELLANT'S CONTENTION THAT PRIORITY WAS LOST TO THE ELM ORLU FOR FAILURE TO ADVERSE THE BLACK ROCK PATENT APPLICATION.

The District Court succinctly said:

> "From the declaratory statements, it appears the Elm Orlu is the older location and if we reject both statements, by oral testimony the same fact appears." (R. p. 43.)

The appellant contends that priority was lost to the Elm Orlu for its failure to adverse the application for the Black Rock patent. The facts as found by the courts below are well stated in the opinion of the Circuit Court of Appeals as follows:

"At the time when the application for the Black Rock patent was filed, there was surface conflict between a portion of that claim and the Elm Orlu as those claims were marked upon the ground. The application for patent for the Black Rock claim embraced the conflict area, and patent was issued therefor. No adverse claim was filed by the owners of the Elm Orlu. In the application for the Black Rock patent the plat showed only the Black Rock claim and there was no reference to any conflict between that claim and the Elm Orlu, nor was mention made of the existence of the Elm Orlu claim. The applicants for the Black Rock patent were well aware of the Elm Orlu claim, and knew that it had been located at the time when they made their own location. The notice of intention to apply for patent stated that 'the nearest claimants to these premises are claimants to Pollock lode on the southwest.' At that time lessees were mining and shipping ore from the Elm Orlu. There was no fence or enclosure of any part of the Black Rock claim and there was no controversy of any character between the claimants of the two claims. The adjudication of the Land Office was made solely upon the record which was before it, and nothing was determined by the issuance of the Black Rock patent further than the right of the patentees to the surface. *Lawson v. United States Mining Co.*, 207 U. S. 1, affirming *United States Min. Co. v. Lawson*, 134 Fed. 769. The doctrine of the decision in the Lawson case is that an adjudication by the Land Office of the question of surface rights does not necessarily determine the question of underground rights, and that those rights not being subject to adverse claims, the failure to adverse does not estop the parties to litigate the question of priority." (R. p. 904.)

As located, the lines of the Black Rock extended over the lines of the Elm Orlu. This fact was known

to the locators of the Black Rock (Test. Gen. Warren, R. p. 109-111). The testimony does not show that such fact was ever known to any one interested in the Elm Orlu. The entire patent record of the Black Rock claim is an exhibit in this case (Pltfs' Ex. 129, Book of Exhibits, Circuit Court of Appeals, pp. 61 to 105), and the plat is shown on page 119 of said Book of Exhibits. (*)

The notice of intention to apply for a patent (Book of Exhibits, p. 77) shows that "the nearest claimants to these premises are claimants to Pollock lode on the southwest," no mention being made of the Elm Orlu, although both Mr. Belk and Gen. Warren were among the applicants for patent for the Black Rock. At the very time the application for patent was sworn to leasers were mining and shipping ore from the Elm Orlu. (Parks p. 97; McNulty p. 114). (Opinion Court of Appeals p. 904.)

W. A. Clark, one of the entrymen of the Black Rock, testified (R. pp. 435-436) that at the time of the application for patent for the Black Rock there was no controversy of any character between the Black Rock and Elm Orlu claims as to any part of the land included within the Black Rock application for patent.

Whatever adjudication the land department made must have been made upon the record before it. It cannot be inferred that the Black Rock application called attention to any conflict or alleged in terms any priority as against the Elm Orlu. Nor can it be inferred that by its application for patent it asserted any

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(*) NOTE: The exhibits have not been printed as a part of record in this court. In the foregoing references, we refer to the pages of the Book of Exhibits prepared and used in the Circuit Court of Appeals, giving the page where found in that book, also the number of the exhibit. We presume that this sufficiently identifies them.

priority, extralateral rights or mining claims as against the Elm Orlu. The land department had nothing upon which it could determine or adjudicate any such question. It did not pretend to adjudicate it. It simply assumed the applicant was entitled to patent for the surface area delineated on the diagram and that no adverse claim was filed thereto.

The statute does not purport to define the ultimate effect, as a matter of estoppel, of the action of the land department in issuing patent to a tract of mining land. Therefore, the rules applicable to judgments are necessarily applied, and it must be determined from an inspection of the record what was actually tried and decided. Such questions only and not questions of what might have been tried and decided are estopped by the judgment.

In the *Last Chance-Tyler case*, 157 U. S. 683, there was a surface conflict between the Tyler and Last Chance. The Tyler applied for patent, claiming the conflict area; the Last Chance filed an adverse claim. An adverse suit was brought by the Last Chance in support of its adverse claim, in which suit the complaint alleged the existence of the surface conflict and that the Last Chance was prior in date of location. The Tyler company appeared, answered, subsequently withdrew its answer and the Last Chance company took a judgment pro confesso upon the complaint. The court made, and there was incorporated in the judgment roll, a specific finding of priority in favor of the Last Chance. When later a controversy arose as to underground ore bodies beneath the surface of the Last Chance on the dip of the vein which apexed in both claims, the Tyler company sought to claim priority. The judgment roll in the adverse suit was introduced in evidence and claimed by the Last Chance to

constitute estoppel against the Tyler upon that question. This court held that the judgment roll showed that the question of priority was in issue and expressly decided in the adverse suit, and was, therefore, res adjudicata. The decision recognized that it was essential to examine the record for the purpose of ascertaining what questions had been in issue and decided.

Such is the interpretation given to that case by the Circuit Court of Appeals for the Eighth Circuit in

United States M. Co. v. Lawson, 134 Fed. 769.

In that case, Mr. Justice Van Devanter, speaking for the court and referring to the Last Chance-Tyler case said:

> "Priority of location became the pivotal question, and it was insisted that a determination in the course of prior patent proceedings, that one of the claims was superior within the area in conflict, estopped the owner of the other claim from asserting that it was prior in location. * * *
>
> "We think it is manifest from the extracts quoted, and from the opinion as an entirety, that the court recognized that superiority of right is not always or necessarily controlled by priority of location; otherwise the court would not have inquired and determined with such care whether the question of priority of location had been in fact presented and decided in the former action, and would not have conceded that 'other questions may be litigated in an adverse suit.' As before indicated it is not shown in the present case whether there was an adverse suit, nor, if, so, what questions were in fact presented and determined therein, nor upon what ground the superior right to the area in conflict was asserted and sustained in the patent proceedings. The claim of estoppel was

interposed by the defendants, and the burden was upon them to show the existence of every fact essential to sustain it."

The decision of the Circuit Court of Appeals was affirmed by this court in

Lawson v. United States M. Co., 207 U. S. 1.

The appellant relies in the courts below, as sustaining its contention that priority had been lost to the Elm Orlu, upon the case known as the First Stemwinder Case.

Empire State-Idaho M. & D. Co. v. Bunker Hill & Sullivan M. & C. Co., 109 Fed. 538.

decided by the Ninth Circuit Court of Appeals. That decision was prior to the decision in

Lawson v. United States M. Co., 207 U. S. 1.

Judge Bourquin in this case holds that the Lawson case supersedes the decision in the Stemwinder case (R., p. 43). Such also was the conclusion of the Supreme Court of Montana in

Anaconda Copper M. Co. v. Pilot Butte Co., 52 Mont. 165-184.

The Circuit Court of Appeals in this case also recognized that the question was controlled by the decision of this court in the Lawson case.

The text writers were unanimous in so construing the Lawson case and in approving the conclusions of

the Circuit Court of Appeals for the Eighth Circuit on this question.

> *Lindley on Mines,* 3d Ed., Sec. 742;
> *Costigan on Mining Law,* p. 396, Note 20;
> *Kenny on The Law of the Apex,* pp. 233-234.

The accompanying diagram shows the relative location of the claims which were involved in the Lawson case:

The United States Mining Company owned the Old Jordan, Mountain Gem, Jordan Extension, Grizzly, Northern Light and Fairview. Lawson and his associates owned the Kempton and Ashland. The controversy was over the ore bodies lying beneath the surface of the Grizzly, Northern Light and Fairview claims. The ore bodies belonging to a vein with a broad apex which was bisected longitudinally by the Old Jordan, Mountain Gem and Kempton, and which crossed the side lines of the Ashland. There was a surface conflict between the Kempton and the Mountain Gem and Old Jordan. The Kempton applied for and received a patent without, so far as the record disclosed, protest or adverse on the part of the Mountain Gem or Old Jordan. The Old Jordan and Mountain Gem were in fact older in order of location and in priority unless a failure to adverse gave that priority to the Kempton. The Kempton owners claimed that priority was established in their favor by issue of the patent without adverse. The Circuit Court of Appeals for the Eighth Circuit and this Court, however, held otherwise, and the ore bodies in dispute were awarded to the owners of the Mountain Gem and Old Jordan.

Upon the plat attached will be seen the outlines of the claims; the vein shown in red and the conflict areas between the Kempton and Old Jordan and the Kempton and Mountain Gem by individual cross hatching.

An examination of the opinions of this Court and the Circuit Court of Appeals will show that there is no ground for any distinction between the Lawson case and the case at bar.

The doctrine is firmly established by these cases that mere failure to adverse does not determine priority of location and the patenting of a junior claim, nothing to the contrary appearing, is not a determination of priority. In order that the question of priority be determined by the issuance of patent, it is essential that the question of priority must have been actually presented and determined.

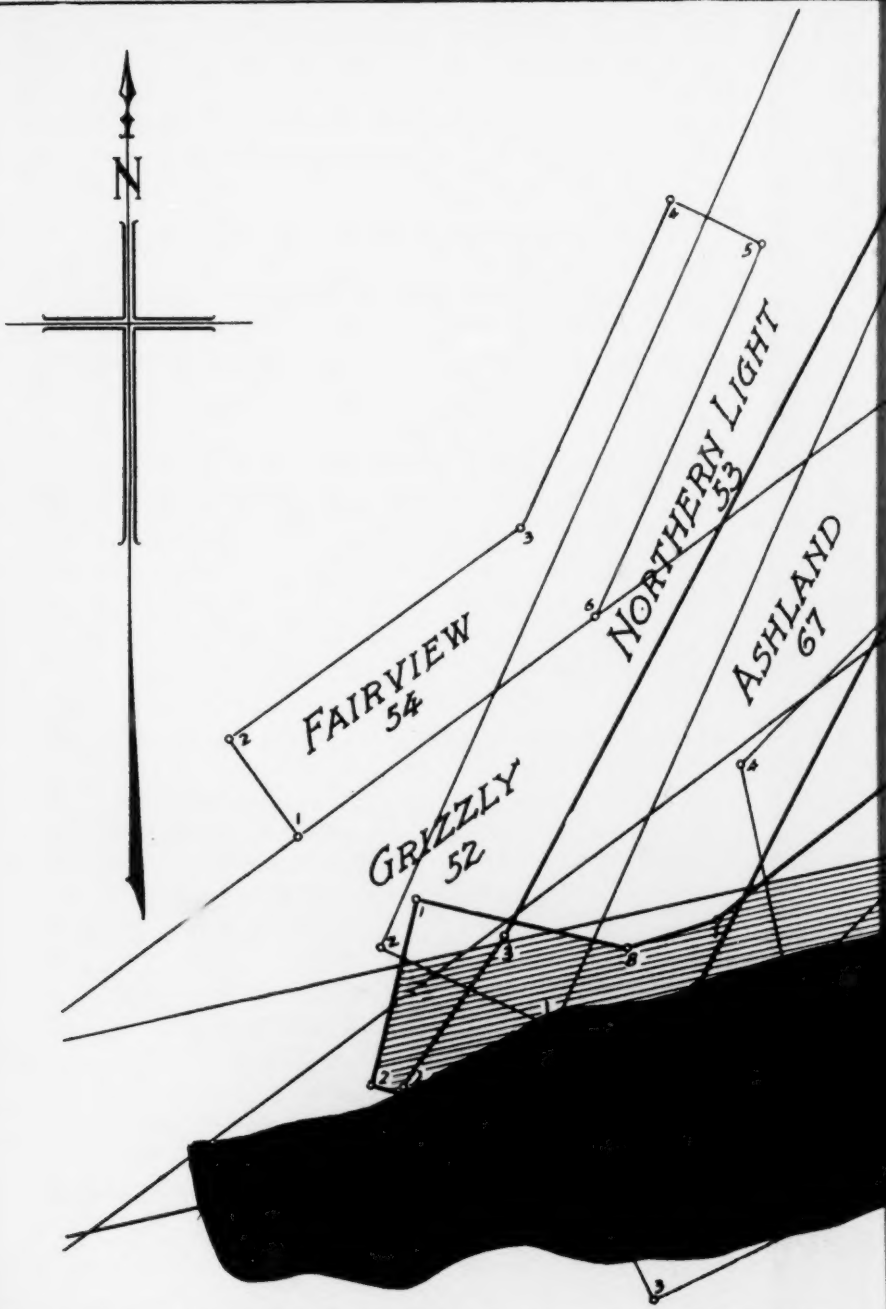
The record in this case shows that no such questions were ever raised or determined, either in the Land Department or in any adverse suit.

The Supreme Court in the *Last Chance-Tyler* case, 157 U. S. 683, says:

> "The particular matter in controversy in the adverse suit was the triangular piece of ground which is not the matter of dispute in this action. The judgment in that case is therefore not conclusive in this as to matters which might have been decided, but only as to matters which were in fact decided."

The doctrine of *res adjudicata* applies only where there is a record.

> *Story Equity Pleadings*, 10th Ed., Sec. 781; (Note "A" citing re House, 28 Chancery Div. 518).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NORTHERN LIGHT
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ASHLAND
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GRIZZLY
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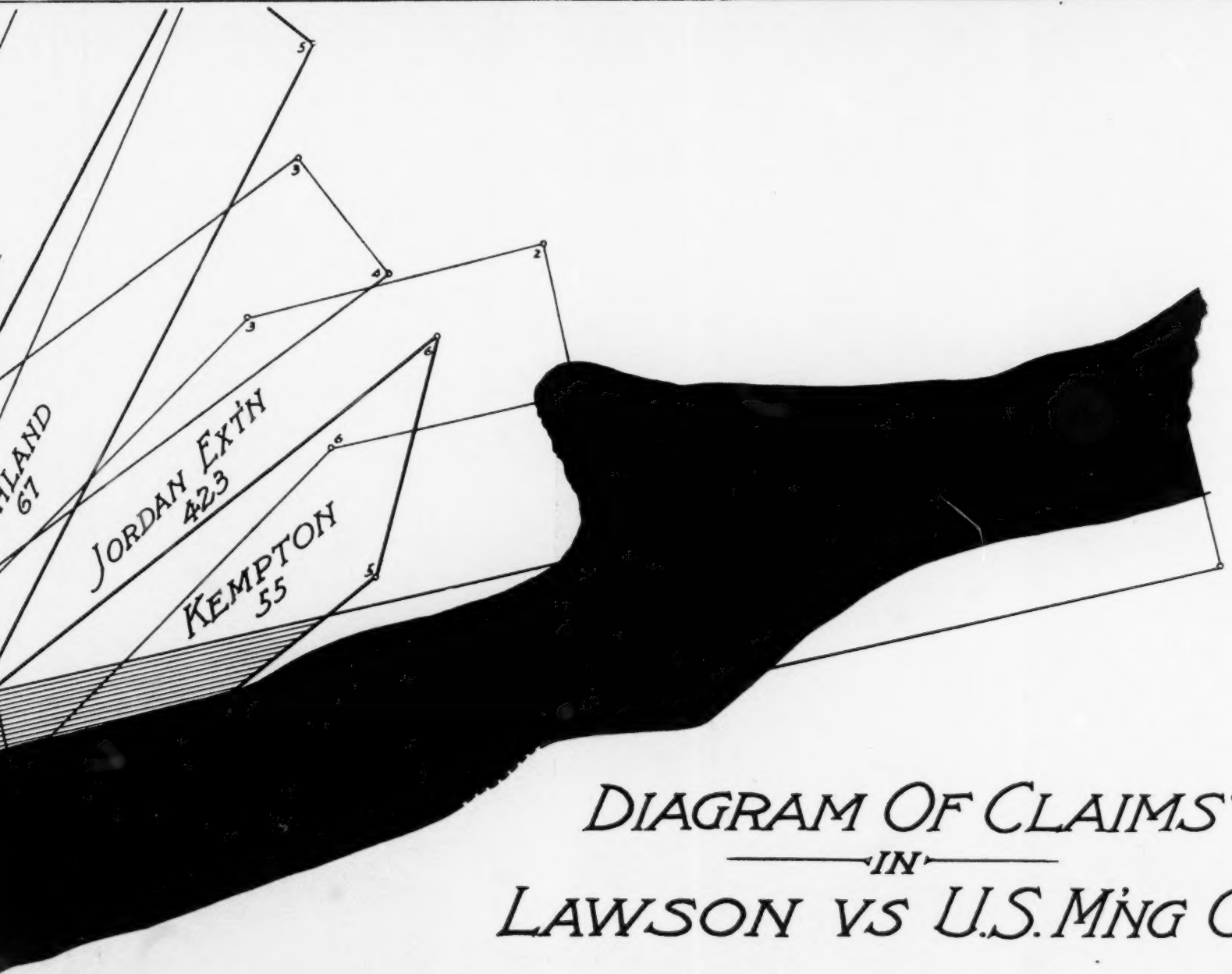

DIAGRAM OF CLAIMS
IN
LAWSON VS U.S. MNG CO.

ALL.

The burden is upon one setting up a prior judgment as a bar to show the existence of every fact essential to sustain it.

U. S. Min. Co. v. Lawson, 134 Fed. 769-777.

The plea of *res adjudicata* is *stricti juris* and must be established beyond question and all doubts inure to the benefit of the party against whom it is pleaded.

Van Fleet's Former Adjudication, Sec. 278.

The Black Rock patent record does not show that any such question was suggested or determined.

V.

PYLE VEIN.

The southerly branch, strand or fork of the Rainbow is known as the "Pyle" vein or strand.

By its 3rd finding of fact, the trial court found:

> "That the Pyle strand of the Rainbow vein diverges from the south side of the latter vein in the Elm Orlu claim, and there and for some indefinite distance easterly has its apex in the Elm Orlu claim" (R., p. 33).

The trial court in its opinion (R., p. 45) says that it is "clear that at the points of divergence and for some undefinable distance easterly its apex is in the Elm Orlu". And again in the opinion rendered before entering the decree (R., p. 897): "The Pyle strand undoubtedy apexes in the Elm Orlu."

This finding of fact was attacked in the Circuit Court of Appeals. Respecting it, that court says:

"There are several assignments of error to the findings of fact, the principal of which are that the court erred in finding that the Pyle strand of the Rainbow vein diverges from the south side of that vein in the Elm Orlu claim, and there and for some indefinite distance easterly has its apex in the Elm Orlu. * * * The appellant does not assert that the findings of fact are unsupported by competent evidence, but contends that they are contrary to the weight of the evidence. The trial court made its findings after an evidently careful and painstaking investigation of the testimony and the exhibits, and after a personal inspection of the mining properties. We have examined the record sufficiently to see that the findings are all supported by the credible testimony of reputable witnesses. Upon settled principles which this court has always recognized, findings so made upon conflicting testimony are conclusive upon this appeal." (R. p. 906).

Among the forty-two assignments of error upon which appellant relies to reverse the judgment and decision of the court below, are several attacking the findings of fact of the courts below with reference to the Pyle vein. In view of the specific findings and of the well settled principle that the concurrent findings of the two courts below will not be disturbed in this court, we presume these assignments will be disregarded.

The Pyle vein at its apex had not been developed to an actual departure from the lines of the Elm Orlu claim at its easterly end, although on one level, the Black Rock 800, it had been developed to the end line.

The trial court expressed some doubt as to whether or not the apex of the Pyle strand extended within the Elm Orlu claim as far easterly as the east end line, or departed through the north side line of the Elm Orlu a short distance westerly of the northeast corner.

The appellees urged that the apex being found within the Elm Orlu claim and extending easterly an indefinite distance within the claim, practically parallel to the side lines of the claim, the court should indulge the inference or presumption that it continued in its own direction to the east end line and should quiet title accordingly.

The vein had been developed upon its course for hundreds of feet on various levels and as far easterly as the Pyle raise, 130 feet from the east end line. Two witnesses for the appellant, however, had testified that the vein might so change its dip as to pass out of the north side line of the Elm Orlu claim instead of through the east end line.

The trial court, in what we conceive to be an excess of caution, expressly reserved the question of the departure of the apex of the Pyle vein from the Elm Orlu claim, leaving the same for future development and determination. If there is any error to be found in this reservation and precautionary decision of the court, it is in favor of the appellant and prejudicial to, or a curtailment of, what might reasonably have been granted to the appellees. Its judgment in that respect was more favorable to the appellant than the decree which it might have entered in pursuance of its express finding of fact.

Finding that the vein did apex in the Elm Orlu and coursed easterly for some indeterminate distance, the prima facie fact, inference or presumption was that it continued to the east end line of the claim, even though the apex had not been developed to a departure there.

The position of the vein with reference to the lines of the claim is a fact subject to proof as is any other

fact. At times, it must be proven largely by inference or opinion. In other cases, from the developments showing a vein to have a certain course, it may reasonably be inferred that it continues in that direction. Proof that the vein does have a course through a claim parallel to its side lines is sufficient to establish prima facie that the vein extends throughout the claim without an actual development every foot of the way.

Armstrong v. Lower, 6 Colo. 393; on rehearing, 6 Colo. 581;

Wakeman v. Norton, 24 Colo. 192; 49 Pac. 283-6;

Bourne v. Federal M. & S. Co., 243 Fed. 466-469;

Montana M. Co. v. St. Louis Min. & M. Co., 147 Fed. 897;

Carson City G. M. Co. v. North Star M. Co., 73 Fed. 597.

In the case first cited above, on rehearing, the Supreme Court of Colorado said:

> "Appellants asserted that a valid location of the Verde was established under the pleadings, and that it was for petitioners to prove that the vein departed from the side line, or terminated at some point distant from the end line thereof. If the vein did so depart or terminate, the portion of the claim beyond such point of departure or termination was open to location by petitioners, and the construction of the discovery tunnel thereon was perfectly proper and legal. The question presented was, should appellants be required to prove, in the first instance, that the Verde vein extended throughout the claim, or should petitioners be

compelled to show a departure or termination thereof at some point short of the ground upon which they did their location work?

We agreed with appellants, and placed the burden upon petitioners of proving by a preponderance of evidence such departure or termination of the Verde vein. * * *

It may, perhaps, be more accurate for us to omit the objectionable word 'presumption' and say that the foregoing facts being proven, the jury may infer therefrom, in the absence of contrary proofs, that the vein extends throughout the entire claim. In other words, that these facts are sufficient prima facie to establish the remaining fact as to the position of the vein in all those portions of the location wherein it has not been actually traced. But whether we use the word 'presumption' or the phrase '*prima facie* proof,' the result, so far as concerns the question under consideration in this case, is precisely the same.

The position of the vein is a fact which in many cases must be proven largely by inference and opinion. If the apex thereof crops out along the surface, its strike may be readily traced; but if it be entirely below the surface, it is extremely difficult, and in some cases impossible, without expenditure of large sums of money, to definitely determine its course for a distance of fifteen hundred feet; and when the prospector has determined that course, according to the best information he has been able to obtain in the time allowed, and has expended labor and money in performing all of the acts required to constitute a valid location thereon, we think he is justly entitled *prima facie* to the protection of the location statutes."

In *Wakeman v. Norton*, the same court held:

"The *prima facie* presumption that a lode whose course and strike are substantially parallel with,

and run in the same direction as, the side lines, continues in the same direction throughout the length of the claim, obtains not only in contests over surface rights, but also where extralateral rights are involved."

In

Carson City G. M. Co. v. North Star M. Co., supra,

an extralateral rights case, Judge Beatty in the Circuit Court of California, says:

"Generally, when a ledge has been traced for such a distance, in a claim of this size it would not be an unreasonable presumption that it would continue in the same direction far enough to cross the end lines of the claim."

In

Montana M. Co. v. St. Louis M. Co., supra,

an extralateral rights case, Judge Hunt in the Circuit Court for Montana, gave the following instruction to the Jury:

"If you find that the course or strike of the discovery vein in the St. Louis mining claim, as (it is) disclosed at the point of discovery or elsewhere, is generally lengthwise of the location, the presumption arises that the discovery vein so located extends through the entire length of such location, and I further charge you that the burden is upon the defendant to overcome this presumption to your satisfaction."

In

Bourne v. Federal M. & S. Co., supra,

an extralateral rights case, Judge Dietrich in the Circuit Court for Idaho, says:

> "In cases where the apex has in part been disclosed, and, so far as known, its course is parallel to the side lines, it may be inferred that the strike of the hidden portion is substantially the same as that which has been exposed. * * *
>
> But this is an inference of fact, and not a presumption of law. It follows, not from the location of the claim, or the directions of the boundary lines thereof, but from the actual course of the apex of a portion of the vein. To that extent, and that only, do the decisions go, and reason goes no further. If in this respect there was originally any doubt as to the views of the Supreme Court of Colorado, as expressed in *Armstrong v. Lower,* 6 Colo. 393, it is dispelled by the opinion upon rehearing (6 Colo. 586), and by the decision in *Wakeman v. Norton,* 24 Colo. 192, 49 Pac. 283.
>
> The principle, therefore, is that where a vein is found to have a certain course, so far as it is disclosed, the inference may be drawn that it will continue in the same direction. Hence, if it crosses an end line and for some distance the strike is parallel to the side lines, it is not unreasonable to conclude that it continues in that direction."

It may be fairly said that this is a settled principle in the mining law recognized by the courts of mining states as a result of their experience and the application of reasonable principles in interpreting facts.

Such is the opinion of the Circuit Court of Appeals in this case.

That the judgment entered by the trial court was more favorable to the appellant than the decree which might have been entered is evidenced by the following extract from the opinion of the Circuit Court of Appeals:

> "The burden was upon the appellant to show that the apex of the Pyle vein passed through the common side line. Its expert witnesses expressed the opinion that it was possible that it did. One of them said that of two possibilities it was 'probably the most probable one.' The court below was of the opinion that the proof was clear that the Pyle vein apexed in the Elm Orlu, dipped beneath the Black Rock, and on strike and dip united with the Rainbow, and said: 'Despite diligent, extensive and costly development work by both parties, the extent of all thereof was indefinite,' and the court reached the conclusion that the appellee owned the Pyle strand or vein insofar as the apex is within the Elm Orlu, and that the appellee owned 980 feet of the Rainbow vein, and that if the veins unite on dip, the prior location owns all below, the appellee's being the prior location, and the court left to future development the question of how far the Pyle apex continued in the appellee's location, and to what extent beneath the Back Rock it united with the Rainbow in such position as to be controlled by the apex in the Elm Orlu." (p. 906.)

The Pyle strand is one of the strands of the Rainbow lode upon which the discovery of the Elm Orlu was made. (Irving, p. 252; Searls, p. 338; Winchell, p. 401.)

> "Instead of one split part being regarded as the principal vein and the other as the secondary, both seem to be regarded as principal veins."
>
> *Costigan on Mines*, 439.

The presumption attached that it extended lengthwise of the claim.

Work M. & M. Co. v. Doctor Jack-Pot M. Co., 194 Fed. 628-9;

Enterprise M. Co. v. Rico-Aspen M. Co., 167 U. S. 108-115.

The trial court found the facts in favor of the appellees, except as to the precise point of departure of the apex of the Pyle from the Elm Orlu claim. Thus far its findings are supported by the findings of the Circuit Court of Appeals. Although, under the law, the burden of proof was upon the appellant to show a departure of that vein which had been developed for hundreds of feet longitudinally within the Elm Orlu claim, the trial court declined to indulge any inference or presumption in favor of appellees' contention.

Such being the state of the record, error was not committed against the appellant. The extent of the rights upon the Pyle cannot be determined until the reserved question shall have been presented and passed upon.

It was asserted in the argument in the court below by counsel for appellant that the lower court reached the conclusion that the evidence failed to support appellees' contentions with respect to the Pyle vein. Such was not the finding of fact.

Reserving the point of departure of the vein from the Elm Orlu claim for future determination gave appellant another chance to prove that it departed through the north side line, which, by the holding of the court below, it had signally failed to do at the trial.

THE DEVELOPMENT UPON THE PYLE VEIN.

It will, perhaps, be of assistance to the court for us to point out the developments upon the Pyle vein and designate where upon the exhibits and in the testimony a description may be found.

At the time of the trial, the Pyle strand was developed as follows:

It had been followed upward through a raise from a stope above the 1200 level of the Black Rock along its dip to the 1000 level of the Black Rock (Pyle, R. p. 124-5; Weed, R. p. 285-6; W. A. Clark, R. p. 130-2). At the 1000 Black Rock, the vein has a distinct northerly dip. (Searls, R. p. 340.) From the 1000 foot level of the Black Rock the vein was developed continuously upward by a series of raises, called the Pyle raise, to a point just below the Elm Orlu 500 level (Searls, R. p. 338-9). This is not disputed. (Finch, witness for appellant, R., pp. 493-4.)

On the twefth floor above the 450 Black Rock, which is a short distance below the 500 Elm Orlu, the vein encountered a fault against which appellees' witnesses believe it terminated. In order to locate the vein above the fault, a large amount of work was done prior to the trial. (Searls, R. p. 339.)

The Clark tunnel, shown upon plaintiff's Exhibit 8, was driven. From the east shaft on the 60 foot level a cross cut was driven both north and south across the Elm Orlu; trenches were constructed upon the surface lettered "B to L". In the Clark cross cut and in the cross cut from the east shaft, the Pyle vein could not be identified (Winchell, R. pp. 402-4; Searls, R. p. 339).

Longitudinally the Pyle vein was developed upon numerous levels for hundreds of feet and was shown to be a continuous vein from its departure from the main

Rainbow strand on the west to its union again on strike with the main Rainbow on the east. (Winchell, R. p. 402.)

This is also shown by appellant's Exhibits 71, 74 and 75, where it is recognized and marked "Pyle Vein". Appellant's Exhibit 71 shows the vein on the Black Rock 800 and the Elm Orlu 900 coursing almost parallel to the Elm Orlu side line.

The course or srtike of the vein as disclosed by the workings and at the highest point observed was almost due east and west. On the 450 level, where it is developed nearest its top, the course of the vein is exactly south 80° east. (Searls, R. p. 339.)

The trial court describes the Pyle vein in his opinion (R., pp. 44-45). He recognizes what the witnesses on both sides testified to, namely, that the Pyle dwindles in width going upward and from a strong vein fifteen feet in width, in the deeper levels diminishes to a few inches in width a few floors below the Elm Orlu 500 level.

From that point a few floors below the Elm Orlu 500 level and beneath the Elm Orlu surface to the deepest workings upon the vein, all of the witnesses agree that it has a northerly dip.

Mr. Winchell (R., p. 403) testifies that he believes the top of the Pyle strand has been developed in the raise from the 451 crosscut, twelve floors above the crosscut, a short distance below the 500 Elm Orlu, and that the vein in its course terminates there against the fault for an undeveloped and unknown distance easterly and westerly, but its strike at that point is such as to carry it across the east end line of the Elm Orlu. In answer to questions asked by the court (R., pp. 405-406), Mr. Winchell says that if the Pyle vein exists

above the slip or fault, which he testifies in his judgment terminates it, it is so small that he has been unable to find it in the workings above; that it might be possible to identify it, but he did not know how to go about it. Mr. Searls (R., pp. 338 to 340 and 357 to 359) testifies to the same effect. Dr. Weed (R., pp. 286-287) testifies that he believes the top of the Pyle strand is beneath the Elm Orlu claim; that in his opinion it does not reach the surface.

We have referred to the above testimony in order that the court may know that there was substantial, credible and reliable testimony supporting the finding of the court that the apex of the Pyle vein was within the Elm Orlu claim for an indefinite distance easterly from its departure from the Rainbow.

It is true that at this elevation (12 floors above the Black Rock 450) the vein had not been developed east of the Pyle raise to the east end line of the Elm Orlu claim, but that end line was only 130 feet from the Pyle raise and the vein so developed in the raise was there 60 feet from the north side line of the claim, with a course almost parallel to that north side line. (Pltfs' Ex. 11.)

On behalf of appellant, Mr. Finch gave it as his opinion that the mineralization in the Pyle ceased at the 500 Elm Orlu, and it existed above that elevation only as an ancient fissure filled with postmineral gouge (R. p. 493).

Mr. Finch's description answers the definition of an apex and fixes it at and below the Elm Orlu 500 level.

Mineral is essential to the existence of the vein or lode.

> *Iron Sil. M. Co. v. Cheeseman,* 2 McCreary, 191; 9 Morrison Min. Rep. 552.

"If the evidence proves the existence of such a lode, the question will be whether it extends throughout the Durant incline, manifested by ore in appreciable amounts in the strata of the contact. A barren contact between blue and brown lime will not suffice to establish a lode in that incline; it must carry ore to some extent, and of some value."

Hyman v. Wheeler, 29 Fed. 347.

"Where the mineral-bearing crevice-matter is first met, either on the surface, or, as in blind lodes, underground; but wherever it is met, there begins the apex."

(One of definitions from Dr. Raymond's Law of the Apex);

Lindley on Mines, Sec. 307.

Messrs. Burch and Wiley, for appellant, simply expressed the opinion, Mr. Burch expressing it as a possibility, that the Pyle vein, which had been followed upward on a northerly dip for over 650 feet, would bend back and apex within the Black Rock. It is to be borne in mind that at the highest point at which it is identified, it is beneath the surface of the Elm Orlu and its dip is mere conjecture (Test Burch, pp. 699-700).

Although the Clark tunnel and other workings had been driven above the 450 level of the Black Rock, none of them have developed a vein which either of these witnesses or any of the other witnesses was willing to correlate with the Pyle. Extensive workings and thousands of dollars were spent in developing to develop and identify the Pyle vein above the 500 foot level of the Elm Orlu.

The Circuit Court of Appeals referred to this improbable theory of the appellant's witnesses as follows:

> "Its expert witnesses expressed the opinion that it was possible that it did. One of them said that of two possibilities it was 'probably the most probable one.'"

Defendant's Exhibits 87 and 88 illustrate how far fetched is the theory of appellant's witnesses in this respect. Observe the unusual bend which must be given to the vein above its highest developed elevation to bring it back beneath the surface of the Black Rock. None of the witnesses for the appellant pretended that he had seen the Pyle above a point near the Elm Orlu 500 level. The view that on its upward extension it might so bend and apex in the Black Rock was purely speculation and guess. The inference or presumption that a vein, which has been developed upon its course for a considerable distance, will continue upon that course is no stronger than the inference that the dip of a similarly and as extensively developed vein will continue.

A vein which has been developed upward toward the surface beneath Elm Orlu ground for a distance of 650 feet, as shown by appellant's Exhibit 88, which at its top shows no change in dip, must be presumed to continue on to the surface in that direction. If it extends above that point at all, any other presumption would do violence to a sense of order and physical law.

Witnesses for the defendant, as above pointed out, testified that they believed the apex of the vein to have been developed as far easterly as the Pyle raise beneath the surface of the Elm Orlu, and Mr. Winchell, at least, testified that he would not know how to go about finding it above that point.

The position of the vein is a fact which in many cases must be proven largely by inference and opinion.

Armstrong v. Lower, 6 Colo. 581.

We have perhaps discussed the Pyle vein at greater length than is necessary, but a full view and acquaintance with the facts in connection with this vein cannot prejudice the appellee's case.

It was argued by counsel for appellant in the court below that the decree of the court was so framed that it would not be a bar to a new suit which appellees might thereafter bring against the appellant to quiet title to all of the vein below the union of the main Rainbow and the Pyle strands, if further development showed such union. Summarized, the action of the Court below is this:

(1) It has been found as a fact that the apex of the Pyle vein is within the Elm Orlu claim at its departure from the Rainbow and for an indefinite distance easterly;

(2) The precise point at which the apex of the Pyle vein departs from the Elm Orlu claim has not been definitely found.

(3) The trial court declined to quiet title to any part of the Pyle vein upon the inference that it continued in its course, and although the burden was upon the appellant to show the departure of that vein through a side line (in which it failed), the court reserved the question, gave the appellant another chance and decreed that it should be left to further development and future determination.

The decree was distinctly favorable to the appellant and the only other decree that could have been entered was one quieting title in appellees to the east end line of the Elm Orlu.

We believe the court will be convinced that the decree was within the power of the court below to make and enter. The court believed it to have that power and it was not forbidden by finality in litigation. If the decree, in so far as the Pyle vein is concerned, lacked the finality which is essential to a decree in equity, then the action of the court with reference thereto is merely interlocutory and subject to further action by the trial court, and until the reserved question is presented and passed upon, the substance of the findings of the court with reference to the Pyle will not be here reversed.

Appellant's counsel will cite the case of

Quint v. McMullin, 37 Pac. 381.

The conclusion of the court in that case is as follows:

> "Inasmuch as the trial court expressly refrained from considering the merits of the special defense set up by the defendant, the merits of that defense are not before us for review; but is was the duty of the trial court to pass upon that question and all other questions raised by the pleadings, and to thereupon grant or deny plaintiff's demand that his title be quieted."

There are a number of authorities involving equitabe decrees adjudicating water rights where it has been held that the court's findings have not been sufficiently certain.

Barrows v. Fox (Cal.), 32 Pac. 811;

Riverside Water Co. v. Sargent (Cal.), 44 Pac. 560.

Nephi Irr. Co. v. Vickers (Utah), 49 Pac. 301.

They each point out that the decree could have been upheld if under the circumstances of the case the indefinite and uncertain quantity given by the decree was capable of ascertainment.

The point of departure of that vein from the Elm Orlu claim is as capable of ascertainment as would be the extent to which any vein dipped beneath the surface of an adjoining owner.

Courts of equity frequently have found it unnecessary or impracticable at the time of entering the decree to decide every question which might arise, and have frequently reserved for future determination questions which may arise touching even matters which were put in issue. *Daniells' Chancery* (6th Am. Ed. * 859).

A matter within the issues, or one which might have been determined in a previous action, is not concluded where it is reserved by the decision. A number of cases where questions have been reserved are discussed in

Lefman v. Brill (C. C. A. 6th Cir.) 142 Fed. 44.

Hamlin v Railroad Company (Mass.), 57 N. E. 1006.

Louisville & N. R. Co. v. Railroad Commission, 205 Fed. 800;

Owen v. Higgins, 84 N. W. 713.

Before a judgment of a court is res adjudicata as to a question involved in a suit it must appear that that question was not only involved but was determined.

Russell v. Place, 94 U. S. 606, 608;

Northwestern Port Huron Co. v. Babcock, 223 Fed. 479.

It should be borne in mind that the development work for the purpose of showing the facts had been steadily progressing for three or four years, and it was admitted that both sides had exercised all reasonable diligence to develop the veins in the properties. The court realizing the large property interests invoved did not wish to enter any judgment which was based upon the presumption of the apex running to the east end line, and, at the same time finding the apex of the Pyle in the Elm Orlu, declined to deny the Elm Orlu claim rights upon it, but preserved the property rights of the parties in the Pyle for subsequent development and determination. The power of the chancellor has long been recognized to be as flexible as the subject matter of the litigation may require. As well said by this Court:

> "It was objected to in *Joy's case* that the court was proposing to assume the management of the railroad 'to the end of time', but Mr. Justice Blatchford, speaking for the court, responded that the decree was compete in itself, and that it was 'not unusual for a court of equity to take supplemental proceedings to carry out its decree and make it effective under altered circumstances'."
>
> *Union Pacific Ry. Co. v. Chicago Etc. Ry. Co.*, 163 U. S. at page 603.

It is shown by the opinion, findings and decree that the question as to where the apex of the Pyle passed out of the Elm Orlu was not adjudicated or determined but was expressly reserved. The appellant will maintain that because the court did not determine the point of crossing that plaintiff has failed in its proof and that the decree should be, so far as the Pyle is concerned, for the defendant.

The foregoing cases will dispose of that contention. The appellant clearly did not meet the burden which was upon it of showing the departure of the apex of the Pyle through a side line of the Elm Orlu. Its witnesses simply gave it as their opinion that such was a possibility. (See testimony of Albert Burch, p. 697). The court gave the appellant another opportunity by development to show that the apex did cross a side line. In view of the peculiar nature of mining property and of extralateral rights upon veins and the danger of quieting title upon presumptions, the decree which was entered appeals to one as both wise and just, dictated by conservatism and prudence on the part of the court, exercised really to the advantage of the appellant. The question reserved, namely, the question of where the apex departed from the Elm Orlu claim, was a fact to be ascertained in the execution of the decree.

If any other view is to be taken, it is that the judgment is not final with reference to the Pyle vein, even though it is final as to the main strand of the Rainbow, and as to the question of priority, and that therefore with reference to the Pyle vein the appeal is premature.

Mass v. Lonstorf, 166 Fed. 41.
Odert v. Marquet, 175 Fed. 44;
Scriven v. North, 134 Fed. 366.

The decree may be final as to one phase of the controversy and not final as to other matters involved in the litigation and decree.

Forgay v. Conrad, 6 How. 201.
Thomson v. Dean, 7 Wall. 342.

and cases cited above.

Subsequent to the trial development work of appellees on the Pyle vein extendnig downward disclosed that appellant was mining from that vein where the apex was in the Elm Orlu, and the plaintiff's development work further showed the point of departure of the Pyle apex.

Proceedings were instituted to protect the rights in said ore.

The court below rendered a further opinion which clearly shows the judgment entered was one of which the appellant could not complain. Therein the court says:

> "The proof was clear that the Pyle apexed in plaintiff's location, dipped beneath defendant's location, and on strike and dip, united with the Rainbow; but despite diligent, extensive and costly development work by both parties, the extent of all thereof was indefinite. In view thereof, taking into consideration all the circumstances, the importance to both parties, the departure from state construction on the issue of priority, the uncertainty of inevitable appeal, the inherant and peculiar nature of lode estates in that boundaries or estate-dividing lines along the dip of lodes are incapable of final, definite determination, it seemed the interests of both parties would be served by decision and decree as made, viz., that plaintiff owned the Pyle strand in so far as the apex is within plaintiff's location, that the defendant owned the Rainbow vein, and, in effect, if the veins united on dip, the prior location owned all below, plaintiff's being the prior location in this court's opinion. The court obviously left to future development and determination, to make definite what the proof and decree left indefinite, viz., how far the Pyle apex continued in paintiff's lo-

cation, to what extent it dipped beneath defendant's location, and united with the Rainbow, if at all, where controlled by the apex in plaintiff's location. It was believed that this, under the circumstances, was not forbidden by speed and finality in litigation; for after all, these latter are not the ends but only means of litigation and justice. In this may be error, but if so, though it may be corrected on the pending appeal, it is the decree and law of the case; and until corrected on appeal, must be upheld and given effect.

Now comes plaintiff and makes a sufficient exparte showing for the hearing it asks, and to warrant plaintiff's protection pending proceedings, if its allegations are established at such hearing.

Plaintiff now alleges development work subsequent to the trial demonstrates that at points where the Pyle apex is in its location, the Pyle on dip unites with the Rainbow, and that below the union defendant is taking the ore contrary to the decree that plaintiff is owner thereof.

This is a situation contemplated by the court's decisions and decree. If true, defendant is taking ore out of the Pyle strand, in that the Rainbow vein, in contemplation of law, ends at the union all below being the Pyle strand. If true, defendant is disturbing the rights of plaintiff under the decree. Protection therefrom is plaintiff's due. And this in no wise impairs but effectuates the decree —executes it. It takes nothing from defendant awarded to it by the decree. It ensures to both parties all that the decree awarded them."

The court was not called upon to determine whether there was a junction on dip of the Pyle and Rainbow strands. The complaint did not charge that the Pyle united or joined on dip with the main strand of the Rainbow. Some of the witnesses for appellees expressed it as their opinion that such would be the

case upon deeper development. Asking to have its title quieted in the Pyle vein, a decree quieting title is not required to settle the extent to which the vein so dips. It does not undertake to do so in this case with reference to the other veins, because those are matters of future development.

The question in issue was whether or not appellees were entitled to have their title quieted in the Pyle strand. If there was a union or junction below, if their title was quieted in the Pyle, by virtue of priority below the union the vein would belong to the Elm Orlu. From the record and findings of the court, it may be that union will never take place. That does not deprive the appellees of their rights in the Pyle vein, because they are not dependent upon union. In an extralateral controversy, where title is quieted in a vein of "A" against the claims of "B" and "A's" claim adjudged priority if upon deeper development the vein of "A" and a vein apexing in the ground of "B" unite, below the point of union the united vein is "A's", although it may require supplemental or other proceedings to enforce the decree. The contingencies of deeper development are not attempted to be covered by the decree in such a case.

The court in its opinion disposes of this as follows:

> "Even as it is not known to what extent the Pyle dips beneath the Black Rock, it is not known to what extent the Rainbow east of the 301 plane dips beneath the Elm Orlu.
>
> A decree conforming to the findings and quieting each party's title to all veins apexing in its claim, wherever they dip, would not be impaired, should deeper development disclose union of veins owned by them respectively. For at the

> union the junior location's vein would be at an end, and below would be only the senior location's vein. Some of the like difficulties attendant upon apex litigation are noted in *Keely v. Mining Co.*, 169 Fed. 603, 95 C. C. A. 99." (R. p. 897.)

In the case cited, the Circuit Court of Appeals for the Eighth Circuit said.

> "Obviously they could not make a claim until the facts should develop which under the law would give them a right. Their only right was a conditional and contingent one which they might assert, or might not, when the facts arose which would require them to take action."

The court could not undertake to quiet title to an undeveloped or to a possible junction at greater depth. Assuming that the title in the appellant was quieted to the Rainbow strand east of the 301 plane, and title in the appellees to the Pyle strand to the east end line of the Elm Orlu, if in deeper development those strands should unite, then the effect of the decree would be that the Elm Orlu would take beneath the point of junction by reason of priority.

Let it again be repeated that the complaint did not allege, and the appellees were not called upon to prove, any union or junction.

VI.

THE CREDEN VEIN.

Assignments of error 21 and 41 are directed to the conclusion of the courts below on the Creden vein. This is a small, irregular vein. Its length on the 1300 level is 60 feet. (R. p. 175). The findings of

the court with reference to this vein being made upon conflicting testimony, it is impossible to conceive upon what ground this court could be induced to review the evidence and find the facts otherwise than as found below.

Not having been developed upward to its apex, the court decreed that the plaintiff was entitled to that part of the Creden, the apex of which was in the Elm Orlu, and the defendant to that part which was in the Black Rock; the point of crossing not being disclosed, that was left to future determination and development.

VII.

THE JERSEY BLUE LODE CLAIM.

Assignments 17, 18, 24 and perhaps some of the general assignments are directed to the action of the court in quieting title in appellees to the Rainbow lode beneath the Jersey Blue claim.

The complaint alleged that the Rainbow vein apexed in the Elm Orlu and thence coursed easterly, and on its downward course northerly passed under the surface, not only of the Black Rock, but also of the Admiral Dewey, Silver and Jersey Blue claims owned by the defendant.

In the answer, in so far as the Jersey Blue, Admiral Dewey and Silver claims were concerned, the appellant relied solely upon denials and did not plead an apex in any of said claims; in other words rested solely upon its common law rights.

At the trial the following admissions were made by the appellant:

"'Mr. Dickson: If it will save any time, we will state that we make no dispute about the fact that from the discovery shaft of the Elm Orlu as marked on Exhibit 6, there is a vein continuously from that to and across the westerly end line of the claim.' (R. p. 146) * * *

Mr. Dickson: We admit it (Rainbow) crosses the west end line at the apex. (R. p. 164.) * * *

Mr. Dickson: We do not dispute, Mr. Gray, that the vein called the Rainbow lode by our friends upon the other side and shown upon exhibit 4, continues without interruption in its downward course to the deepest workings. (R. p. 405.) * * *

Mr. Dickson. We admit that there is continuity of ore in what they call the Rainbow lode from the surface down to the deepest workings.'" (R. p. 405.)

The Rainbow vein at the time of the trial was developed beneath the surface of the Jersey Blue on the Black Rock 1200 foot level (Pltfs. Ex. 21), on the Elm Orlu 1500 (Pltfs. Ex. 23) and upon its downward course practically reaches beneath the Jersey Blue surface on the Elm Orlu 1300 level (Pltfs. Ex. 20). It was also developed beneath the surface of the Admiral Dewey on the 1200 foot level of the Black Rock (Pltfs. Ex. 21), the 1400 foot level of the Elm Orlu (Pltfs. Ex. 22), 1500 Elm Orlu level (Plts. Ex. 23) and 1400 Black Rock level (Pltfs. Ex. 24), and that deeper it lies still farther to the north and on the 1700 level is beneath the surface both of the Admiral Dewey and Jersey Blue, is shown by the developments upon that level and disclosed upon the map thereof (Pltfs. Ex. 26. Dr. Weed testified that the apex of the ore body found beneath the surface of the Jersey Blue was the Rainbow apex on the surface of

the Elm Orlu claim (R. p. 283); so did Mr. Searls (R. p. 341). This is not disputed.

The appellant on behalf of the Jersey Blue was content to rest by introducing a copy of the patents (Defts. Ex 63, Book of Exhibits, p. 125).

With reference to the Admiral Dewey, it was admitted that if the Elm Orlu had any extralateral rights there would be no contention by the appellant against them on behalf of the Admiral Dewey. (R. p. 426).

The court quieted the title in appellees to the Rainbow vein beneath both the Jersey Blue and the Admiral Dewey claims east of a vertical plane drawn through the west end line of the Elm Orlu (Par. IV of Decree).

Such being the record, no reason exists why the appellees' title to the Rainbow vein should not be quieted as against the Jersey Blue and the Elm Orlu granted extralateral rights beneath the Jersey Blue.

No claim is made in the answer that there is an apex within the Jersey Blue of any vein which leads to such ore bodies, or that any part of the Rainbow apex is found therein. In the absence of a claim on behalf of the appellant that it had the apex of such ore bodies within the Jersey Blue, the rights of the Elm Orlu become fixed and no ground exists for reversing the judgment. If the Jersey Blue had any rights other than its common law right, it was appellant's duty to rely upon the same by pleading, as is the common practice, and as was done by the appellant's counsel in the case of the Black Rock. In this suit to quiet title, the failure to set up any claim which the defendant might have is a waiver thereof.

Hanley v. Beatty, 117 Fed. 59.

The question of priority between the Elm Orlu and Jersey Blue is entirely immaterial, though the record shows the Elm Orlu to be senior. The location notice of the Jersey Blue is not presented and the earliest evidence of any title is the patent, the entry for which was made on the 26th day of May, 1881. As patented, the Elm Orlu patent corner was set on the Jersey Blue and .06 of an acre of the Jersey Blue included within the patent survey and excluded from the Elm Orlu. There is nothing to show that there was any surface conflict between the two claims prior to patent, and it does not appear whether the .06 of an acre was within the original location of the Elm Orlu or not. The question, therefore, of the failure to adverse does not enter into the consideration of the rights of this claim.

VIII.

RELATION OF VEINS IN THE PROPERTIES.

Many of the assignments of error are directed to the action of the court below in approving and not disturbing the findings of the trial court, in reference to the relation of the veins to one another and to the lines of the claims.

Again adverting to the findings of the trial court, on page 33, we find the following express findings:

> "(2) That the north wall of the Rainbow vein apex crosses the common side line between said claims, 190 feet from the southwest corner of the Black Rock claim, and that the south wall of said vein apex so crosses-301-feet from said corner.
>
> (4) That the Jersey Blue vein apexes in the Black Rock claim, does not unite with the Rain-

bow vein, and crosses on strike and dip the Rainbow vein, on strike east of the Rainbow apex crossing of the common side line.

(6) That the apex of the easterly strand of the Rainbow vein in the Black Rock claim, terminates at a point within said claim east of the Elm Orlu east end line projected and about 250 feet west of the Black Rock east end line.

We assume these questions of fact are by the conclusions of the two courts below settled and determined. A very brief statement, however, of the relation of the several veins to one another may lend to a clearer understanding of the controversy.

It is established by the testimony and is not controverted that three of the recognized geological features of the Butte District are found in the property in controversy, namely:

(1) The ancient east and west veins of which the Rainbow is typical;

(2) A series of northwest-southeast fault veins of later geological age called "Blue veins";

(3) A northeast-southwest fault series, postmineral, of which the Black Rock fault is typical.

The witnesses upon both sides agreed that the Rainbow belonged to the ancient east-west vein system and the court so found. The trial court described the Rainbow vein in its opinion (R. p. 46).

The issue to which most of the geological testimony was directed was whether or not the Jersey Blue vein which for a considerable distance apexed in the Black Rock claim, belonged to the northwest or blue vein series, or to the east-west Rainbow series. Appellant's witnesses were of the opinion that it was of the same age as the Rainbow and was one of the ancient veins,

uniting with the Rainbow upon dip and strike. Appellees' witnesses were of the opinion that it belonged to the blue vein series; that it faulted and dislocated the Rainbow vein on both strike and dip and was developed on both the north and south sides of the Rainbow vein.

The trial court found that the Jersey Blue did not unite with the Rainbow and crossed it on both strike and dip. These findings were amply sustained by the testimony of Winchell, Irving, Weed, Searls and Greene.

The trial court in its opinion refers to the fact that it was admitted, not only during the trial, but during the argument by the appellant, that the Rainbow apex crossed the Elm Orlu west end line and common side line and from its apex in the Elm Orlu on dip extended under the Black Rock, and that the great ore body under both claims is in said vein and the vein extends downward to the uttermost depths (R. p. 45). "These facts are conclusively proved as well."

After referring to the admissions, the court says:

The court in part reaches its finding by reason of the fact that the burden of proof was upon the appellant to show the union between the Jersey Blue and the Rainbow. It expressly found, however, that "The Jersey Blue more approximates to the 'Blue' veins than to the Rainbow." (R. p. 48.)

The testimony of the only witness for appellant who did testify to a union of veins was given little weight for reasons set forth in the opinion of the trial court (R. pp. 48-56). It suffices to say that there was credible testimony supporting the finding of the court, and that it has received the approval of the Court of Appeals.

A careful reading of the opinion of the trial court will show a most painstaking and patient investigation of the testimony. The court also observed the witnesses and to some extent, at least, was unable to give to some witnesses the weight that he attached to the testimony of others. All this was supplemented by a personal examination of both mines—surface and underground.

IX.

ALLEGED ESTOPPEL BY DEED.

Assignments 23, 30 and 31 and certain of the general assignments are directed to the action of the court below in affirming the action of the trial court, denying effect as an estoppel to a deed pleaded by the appellant. The facts with reference to this deed are stated by the trial court as follows:

> "In the matter of the estoppel by deed claimed by defendant, in August, 1906, plaintiff (*Clark-Montana Realty Co.,*) executed to defendant's predecessor in interest an option to purchase 'all of the right, title and interest of plaintiff' in and to the Black Rock quartz lode mining claim—being an undivided one-quarter thereof. This was recorded October 31, 1906. October 26, 1906, plaintiff's directors adopted a resolution of sale to the optionee and authorizing its officers to execute to him a deed of 'an undivided one-quarter interest in and to that certain quartz lode mining claim known as the Black Rock quartz lode mining claim * * * it being the sense of the board of directors that said company shall convey * * * all of the right, title and interest' it has 'in and to the above described property.'

This was recorded May 1, 1907. October 29, 1906, plaintiff executed to the optionee a deed, reading that plaintiff 'does remise, release and forever quit claim unto the said party of the second part, and to his successor forever, all the right, title, interest, claim and demand of the party of the first part in and to that certain portion, claim and mining right, title and property on those certain ledges, veins, lodes or deposits of quartz and other rock in place, containing precious metals of gold, silver and other metals * * * the following described mining property, to-wit: An undivided one-quarter interest in and to that certain quartz lode mining claim known as the 'Blackrock' quartz lode mining claim. * * * It being the intention of the party of the first part to convey to the party of the second part all its right, title and interest in and to the above described property. Together with all the dips, spurs and angles and also all the metals, ores, gold, silver and metal-bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereunto incident, appendant and appurtenant, or therewith usually had and enjoyed; and, also, all the estate, right, title, interest, possession, claim and demand whatsoever of the said party of the first part of, in or to the said premises and every part or parcel thereof.'

November 1, 1906, the optionee and grantee in said deed conveyed all received by virtue of it to others, who in turn conveyed to defendant." (R. p. 59.)

At the time of the execution of the deed by appellee, Clark-Montana Realty Company, it was the owner of an undivided one-fourth interest in the Black Rock claim and the owner of an undivided one-half interest in the Elm Orlu claim.

In the trial court, the appellant's contention was that by that deed the Realty company conveyed one-fouth of any ores beneath the Black Rock that apexed in the Elm Orlu and a like portion of any ores beneath the Elm Orlu which apexed in the Black Rock, which otherwise might belong to the Realty company (Opinion R. p. 60).

By its assignments of error, it would appear that the appellant is now attempting to extend the claimed estoppel from one-fourth to all of said ores. In other words, the appellant now contends that the owner of a one-fourth interest in the Black Rock claim, which was at the same time the owner of an undivided one-half interest in the Elm Orlu claim, by the deed referred to conveyed, not alone an undivided one-fourth interest in the Black Rock claim, but also conveyed all of the extralateral rights which the Elm Orlu claim might have beneath the surface of the Black Rock claim; all intralimital rights of the Black Rock claim; all extralateral rights of the Black Rock claim, and in addition, all veins apexing in the Black Rock claim which dipped beneath the Elm Orlu claim. even though the said ore bodies within the Elm Orlu claim also apexed within the Elm Orlu claim—four distinct and different estates and rights.

The trial court expressly found:

> "The circumstances and the language of the deed warrant the construction that only the Blackrock and its extralateral rights were within the intent of the parties." (R. p. 60.)

The Circuit Court of Appeal, affirming the District Court, holds:

"There is no reference in the deed or in the negotiations leading up to its execution to the fact that the grantor owned the adoining Elm Orlu mining claim, and obviously there was no intention on the part of the grantor to convey, or upon the part of the grantee to acquire an interest in that claim. In fact, such intention is expressly negatived by the appellant's answer in the present case in which it denied that it claimed any estate or interest adverse to the appellant in or to the Elm Orlu claim, and expressly admitted that the appellee was the owner and in the possession of that claim. There are other circumstances connected with the transaction which might be adverted to, as showing that the intention of the parties was as we have above indicated, but we regard the proposition so plain as to require no discussion, that when the owner of two adjoining mining claims sells and conveys one of them, he conveys only that which is granted by the Government when it issues the patent to that claim." (R. pp. 905-906).

Under the well recognized rule applicable in this court to the findings of the two courts below, it becomes settled that it was neither the intention of the Clark-Montana Realty Company to convey any interest in the Elm Orlu claim or veins apexing in the Elm Orlu, nor was it the intention of the grantee to receive any such estate.

In making these findings, both courts took into consideration the circumstances connected with the transaction; the negotiations leading up to the execution and the other testimony which was introduced by both parties in connection with the claim of estoppel.

The original option given to the predecessor in interest of appellant by the Realty company and the resolutions of the Realty company authorizing the

execution of the conveyance were both before the court and it is proper in construing the deed that those instruments and the surrounding circumstances should be considered as they were considered by this court in

Montana M. Co. v. St. Louis M. & M. Co., 204 U. S. 204.

To maintain its contention with respect to estoppel appellant relies on the decision of this court in the above case. That case is not only distinguishable from the present one, as is held by both the courts below, but, if anything, it is a determination against the claim of appellant.

In the *Montana-St Louis* case, in order to settle a surface dispute and litigation between two adjoining mining claims, the owner of one claim deeded to the owners of the other a portion of the former, describing it by metes and bounds, giving the number of square feet included, immediately followed by the language:

> "together with all the mineral therein contained. Together with all the dips, spurs and angles, and also all the metals, ores, gold and silver bearing quartz rock and earth therein, and all the rights, privileges and franchises thereto incident, appended, or appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, heretitaments, and appurtenances thereto belonging or in anywise appertaining, and the rents, issues, and profits therein, and also all and every right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, or to the said premises and every part and parcel thereof, with the appurtenances."

The pertinent portion of the option (Pltfs' Ex. 128, p. 106, Book of Exhibits), in pursuance of which the deed was executed, is as follows:

> "Witnesseth:
>
> That for and in consideration of the sum of one dollar ($1.00) to it in hand paid, the receipt whereof is hereby confessed and acknowledged, and of the covenants and agreements hereinafter contained, the said party of the first part has given and granted, and hereby does give and grant unto the said party of the second part, an option to purchase all of the right, title and interest of the said party of the first part in and to the Black Rock Quartz Lode Mining Claim, designated as Mineral Entry No. 596, situate in Section six (6) Township three (3) north, Range seven (7) west of the Montana Meridian, being an undivided one-fourth (¼) interest thereof, upon the following terms and conditions, that is to say:"

The pertinent portion of the resolution of the Board of Trustees of the Realty Company is as follows:

> "BE IT RESOLVED: that the Vice President and the Secretary of this company be and they are hereby authorized and empowered to make, execute, acknowledge and deliver, affixing thereto the corporate seal of this company, a deed or deeds to AMASA P. PEAKE, of Valley City, North Dakota,—upon a consideration of one dollar mentioned in each deed,—said deed or deeds to convey to said Peake the following described interests in the following described mining claims or premises situate in Summit Valley Mining District, Silver Bow County, Montana, to-wit:
>
> An undivided one-fourth (¼) interest in and to that certain quartz lode mining claim, known as the Black Rock Quartz Lode Mining Claim,

designated as Lot No. 53, Mineral Survey No. 596, in T. 3 N., R. 7 W., embracing a portion of Section 6, T. 3 N., R. 7 W.

Also an undivided one-sixth (1-6) interest in and to that certain quartz lode mining claim known as the NIAGARA Quartz Lode Mining Claim being officially designated as Lot No. 279, Mineral Survey No. 1945, in T. 3 N., R. 7 W., and lying just north of and adjoining the Black Rock Lode Mining Claim; and also all of the right, title and interest of this company in and to that portion of said Niagara Quartz Claim described as follows:

Commencing at corner No. 3 of the said Niagara Lode, Lot No. 279, T. 3 N., R. 7 W. (marked 3-1945), which is also the northeast corner of the Black Rock Lode, and running thence North 3 degrees 53 minutes west, 438 feet to corner No. 4 of said Lot No. 279; thence north 88 degrees .05 minutes west, along the North side line of said Lot 279, 190.25 feet; thence south 17 minutes east 394 feet to a point on the north side line of the said Black Rock lode; thence south 77 degrees 15 minutes east, 223.5 feet to the place of beginning, containing an area of 1.937 acres.

Also an undivided three-eighths (3/8) interest in and to the RAYMOND Quartz Lode Mining Claim, designated by the Surveyor General as Lot No. 244, embracing a portion of Section 6 in T. 3 N., R. 7 W.

It being the sense of this Board of Directors that said company shall convey to said AMASA P. PEAKE all of the right, title and interest of the said CLARK-MONTANA COMPANY in and to the above described property." (Book of Exhibits, pp. 112-113.).

Judge Walter Bickford, the attorney for the Realty company at the time of the transaction, testified that

he drew the deed conveying the interest in the Black Rock and copied it from a form which was in general use in the Butte camp (R. pp. 788-789).

It has been the custom in the mining states of the west for many years to use the form of words in the deed in question for the purpose of conveying the extralateral rights of the mining claim or claims mentioned in the conveyance. Judge Brewer in the *Montana-St. Louis* case recognized this custom and use of these words in the following language:

> "Further, while it may be true that the words 'together with all the dips, spurs and angles,' etc., are generally employed in conveyances of mining claims in order to emphasize the fact that not merely the surface but the extralateral rights which go with a mining claim are conveyed, yet it must be noticed that in addition to these customary words are these, found in both the bond and the deed: 'Together with all the mineral therein contained;' and they cannot be ignored, but must be given a meaning reasonable and consistent with other parts of the instrument. It is not satisfactory to say that they are only equivalent to those that follow, 'dips, suprs,' etc., that the same thing is meant by each expression. While, of course, repetition is possible, yet it is not to be expected; and when, in addition to the ordinary words found in conveyances of mining claims, is this extra clause, we naturally regard it as making some further grant."

A careful examination of the above decision will show that the estoppel was there sustained because in the deed, in addition to the usual words used for the purpose of conveying extralateral rights (such as those in the deed here), after describing the ground by metes and bounds, there was incorporated the ad-

ditional language, "together with all the mineral therein contained." No conclusion can be arrived at from a reading of the decision in the *Montana-St. Louis* case other than that the estoppel would not have been sustained except for the inclusion of that "unusual" language which is not found in this deed.

The decisions of the lower courts are so clear and convincing, the proposition so definitely settled as to require no discussion; as the Circuit Court of Appeals says, "We regard the proposition so plain as to require no discussion, that when the owner of two adjoining mining claims sells and conveys one of them, he conveys only that which is granted by the Government when it issues the patent to the claim."

We may, however, be permitted to advert to some considerations which fortify the reasons above given for sustaining the decision of the court below.

In effect the contention of appellant is that the Realty company, although owning only an undivided one-half of the Elm Orlu at the time of the deed, in conveying an undivided one-fourth of the Black Rock, was paid to convey, was expected to convey, intended to convey and did actually convey (without mentioning it in the deed, in the option or in the resolutions authorizing conveyance) to appellant's predecessor in title all extralateral rights of the Elm Orlu mining claim under the Black Rock surface.

That there never was any such intent either on the part of the grantor or grantee is shown in the record in various ways. The following facts negative the existence of any thought or reason for conveying any part of the Elm Orlu. They will recreate the atmosphere which existed at the time of the negotiation:

"That prior to the Black Rock location and patent entry, both the Rainbow vein and the Jersey Blue vein at their apices were discovered and known within the Black Rock claim and at their apices appeared as a continuous east-west vein." (7th Fact Finding by Trial Court, R. p. 33).

That both mines were separately entered for patent and patented, and therefore never were parts of a single mineral entry.

That in their early history both mines were worked superficially but independently for their silver content and then discontinued, and later beginning in 1906 or '07 both mines were developed to the deep and into the zinc ores independently and under different ownerships.

There were no developments in the ground at the time of the execution of the deed indicating any underground conflict between the veins apexing in the Black Rock and the veins apexing in the Elm Orlu. As late as 1914, according to the answer, the appellant did not recognize that any vein in the Elm Orlu dipped beneath the Black Rock surface. The answer denied the very existence of the Rainbow vein in the Elm Orlu and particularly described the veins of the Elm Orlu as being only:

1. A north-south vein upon which the attempted location of the claim was made, and which crosses the opposite located side lines of the claim. R. p. 19) Par. XII.
2. An east-west southerly-dipping vein which at its top or apex crosses the west end line of the claim, and which continues easterly therein a distance of 305 feet and no more. (R. pp. 19-20). Par. XIV.
3. Not a vein in the claim east of a vertical plane drawn downward parallel with its west end

line plane and 710 feet easterly distant therefrom, except a north-south vein which is known to cross only one boundary of the claim, namely, its south side line just west of such 710 feet plane. (R. p. 20) Par. XIV.

Therefore, the defendant contended "the plaintiffs have not, nor has either of them, the right to follow the same extralaterly, except between planes drawn vertically downward through the located side lines of said Elm Orlu claim." (R. p. 21,) Par. XVIII.

Under such a conception, it is absurd to believe that the purchasers of an interest in the Black Rock claim were concerned in any way with the Elm Orlu and any possible conflict with their rights.

The answer admitted that the Clark-Montana Realty company was the owner of and in possession by co-plaintiff as tenant of the entity known as the Elm Orlu mining claim (Par. XII), and then "Answering the twenty-second paragraph of said bill this defendant denies that it claims an estate or interest adverse to plaintiffs or either of them in or to said Elm Orlu Lode Mining Claim." (Par. XVIII, R. p. 21).

After such unqualified admission of ownership and disclaimer concerning the Elm Orlu, appellant laid claim to that part of the Elm Orlu under the Black Rock surface by virtue of the conveyance.

When the deed was introduced in evidence, it was over the objection of the appellees, as follows:

"Mr. FOLSOM. We desire to offer an objection to the admission of the deed on the ground that it does not purport to convey nor does it convey anything except the BLACK ROCK claim (R. p. 776) (Exception).

Over the objection that it was immaterial, the appellant proved the consideration for the deed to be $50,000 cash, and stock of a corporation to be formed of the par value of $200,000. (R. p. 435), and that on the day of the execution of the deed the par value of the shares was $5.00 and the market value thereof $4.00 (R. p. 779). And additionally introduced the mesne conveyances in which there is no direct or indirect reference to the Elm Orlu, nor to any part thereof, and in which there is no specific or general conveyance thereof, nor any part thereof. Exhibits 124 and 125. It would therefore seem to follow from such mesne conveyances that if it was intended to pass any part of the Elm Orlu or any title thereto by the exhibited deed, then Peake and his successors were wholly unconscious thereof.

By the introduction of this evidence, appellants recognized that the deed itself did not show any such intent and undertook by testimony to show the intent to convey a part of the Elm Orlu.

With reference to the question of consideration for the deed, the appellant did not show what it cost to purchase the other three-fourths of the Black Rock, whether more or less proportionately than the consideration for the undivided one-fourth purchased from the Clark-Montana Realty Company, and offered no evidence showing or tending to show that such consideration was intended by the grantor or grantee to include the purchase price of any part of the Elm Orlu.

In the resolution (Pltfs' Ex. 127) it is shown that the grantor owned other undivided interests in lode claims adjacent to the Black Rock at the time of the deed, of which the corporation authorized the convey-

ance together with the one-fourth interest in the Black Rock. Inasmuch as the grantor owned other undivided interests adjacent to the Black Rock at the time of the deed and specifically recited such interests in the conveying therof, it is another remarkable coincidence that the grantor did not specifically name the Elm Orlu or the grantee did not require it to be named, if it was within the minds of either to grant or to receive any interest therein. This failure to mention the Elm Orlu should be considered convincingly persuasive that there was no intent to sell or to purchase it or any part thereof. Indeed, the notion of any such conveyance seems to have been born at a belated hour in the minds of the appellants.

Another persuasive fact is that each owner was allowed free access into the mine of the other for purposes of inspection, and that controversies began to arise over the veins and ores as early as 1910, and yet no claim to any part of the Elm Orlu was made as the result of such invesitgations and in pursuance of any supposed rights under the conveyance until the coming in of the answer in 1914.

In the four years of pre-suit controversy, the claims to any part of the Elm Orlu was based altogether upon priority of location. If appellant believed that the deed was intended to convey any part of the Elm Orlu under the Black Rock surface, as now urged, it is indeed remarkable that it is not referred to in these controversies extending over a four year period. Absence of such reference justifies two inferences:

(a) That there never was any intent to seggregate the Elm Orlu and to convey a part thereof by the deed;

(b) That such claim is an after-thought of skillful counsel first suggested eight years after the execution of the deed.

The substance of appellant's claim is that the deed in question, although making no reference thereto, conveyed a portion of what had been granted as the Elm Orlu mining claim by the patent of the United States. In making such claim, appellant disregards the answer, which unequivocally admitted that appellees owned the entire entity known as the Elm Orlu mining claim, and which unequivocally disclaimed any interest therein.

The appellant is estopped to assert to the contrary under the rule in equity thus stated by Daniell:

> "It is to be remarked, that a defendant cannot by answer claim that to which, by his disclaimer, he admits he has no right; and if a disclaimer and answer are inconsistent, the matter will be taken most strongly against the defendant on the disclaimer."
>
> *Chancery Pl.* & *Pr.* (6th Ed.) 705;
>
> *Foster Fed Prac.*, Sec. 155.

The Circuit Court of Appeals recognized and applied this rule (R. p. 905).

The estoppel contended for is evidently one which must appear from the face of the deed. There is not the slightest hint in the deed that the grantor owned any interest in the Elm Orlu claim. There is no representation whatsoever in the deed concerning the Elm Orlu.

The appellant appreciated that it was necessary to and it did go outside of the deed for the purpose of proving the ownership of an interest in the adacent Elm

Orlu claim at the time of the deed's execution, and therefore, the deed in that respect is no longer speaking itself.

Viewed most favorably to the appellant, the conveyance of any part of the Elm Orlu is a matter of supposal. Any supposal is insufficient upon which to found an estoppel. The doctrine of estoppel by deed with reference to certainty is stated by Lord Tenterden as follows:

> "That it was a rule that an estoppel should be certain to every intent; and therefore if the thing could not be precisely and directly alleged, or if it were mere matter of supposal, it was not an estoppel."
>
> *Biglow on Estoppel*, 6th Ed. 411.

Another convincing argument against the position of appellant is found in the opinion of the trial court succinctly as follows:

> "Suppose this deed was of warranty; would plaintiff be liable when the owners of other veins dipping under the Black Rock, of which there are doubtless some, assert their right thereto? Are those veins in the Black Rock? And, if not, why are these of the Elm Orlu? The option was to convey the Black Rock only, not any part of the Elm Orlu. There is nothing to show that the optionee had any knowledge plaintiff owned the Elm Orlu. The circumstances and the language of the deed warant the construction that only the Black Rock and its extralateral rights were within the intent of the parties." (R. p. 60.)

It will be observed from the deed that the grantor specifically declared the intent of the deed immediately after the description by adding, "It being the intention

of the party of the first part to convey to the party of the second part all of its right, title and interest in and to the above described property." The grantor might just as well have added at the close of such quotation, "and no other property." The legal effect in either case would be the same. An application of the rule that the expression of one thing is the exclusion of all others does immediately obtain.

Broom's Legal Maxims, p. 491.

Investment Co. v. Railway Co., 41 Fed. 378.

The specific reference in the deed is to "An undivided one-fourth (¼) interest in and to that certain quartz lode mining claim known as the 'Black Rock' quartz lode mining claim, designated as Lot No. 53" * * * Together with its extralateral rights.

The description of the mining claim in that manner referred it to the identical property which was patented by the government of the United States as Lot No. 53. That patent conveyed the surface of the claim; all veins apexing therein throughout the entire depth between end line planes, excepting, however, out of the grant the portion of any vein apexing in another mining claim. In all these respects it was an estate of equal rights, with rights no more and no less than the adjoining Elm Orlu. By the patent of the United States and by the conveyance in question, nothing passed which was a part of the Elm Orlu claim, a distinct lot and mine.

The reference in the deed to the "dips, spurs and angles, also all the metals, ores, gold, silver and metal bearing quartz, rock and earth therein," has reference to the extralateral rights of the Black Rock

claim, and not to the dips, spurs and angles and the metals therein contained of the Elm Orlu or any other claim. These terms are of such common use and of such long standing as to admit of no other construction.

We again call the attention of the court to the fact that at the time of the execution of the deed, in 1906, there was no evidence that the Elm Orlu did have any extralateral rights beneath the Black Rock surface, and no reason to suppose that any vein apexing in the Elm Orlu did extend beneath the Black Rock surface. Hence it is to be reasonably inferred in the light ot the then circumstances that the parties to the deed had in mind only Black Rock extralateral rights and the extralateral rights of other claims were not under consideration.

The Supreme Court of Montana in

Montana Ore Purchasing Co. v. Boston & Montana Co., 27 Mont. p. 288, 70 P. 1114.

says:

> "There is nothing in this record to indicate that, at the time the first deed was made, either of the parties knew the direction of the dip of the veins; nor is there any presumption that they had such knowledge. If it be true that they did not, what intention could they have entertained with reference to it?"

That the extralateral right of a quartz claim is an integral part of the claim see:

M. O. P. Co. v. B. & M. Co., 27 Mont. 288.
Tyler Co. v. Last Chance Co., 90 Fed. 21;

Davis v. Shepherd (Colo.), 72 Pac. 57;
Cent. Eureka v. East Cent. Eureka (Cal.), 79 Pac. 834.

It is therefore apparent that where the deed refers to dips, spurs and angles and the metals and ores therein contained, it refers to the dips, spurs and angles belonging to the Black Rock and the ores contained in said dips, spurs and angles.

The appellant will cite, in addition to the *St. Louis-Montana case*, supra, the Colorado case of

Bogart v. Amanda Consol. G. M. Co., 74 Pac. 882.

Each of those cases grew out of a settlement of a surface conflict where a small area in conflict was conveyed by metes and bounds. Each case was determined upon an investigation of the surrounding circumstances and a holding that there was an intent to convey the severed portion of the mining claim.

To sustain the contention of appellant would unsettle thousands of titles to quartz claims in the western mining states, which titles are founded upon long accepted belief that the dips, spurs and angles recital in the quartz mining deeds in general use in the west, of which the one in this case is an example, refers exclusively to the extralateral rights of quartz claims mentioned in the deed and not to the extralateral rights of any other claim. As the Circuit Court of Appeals says, the proposition is so plain as to require no discussion, that when the owner of two adjoining claims sells and conveys one of them, he conveys only that which is granted by the government when it issued the patent to the claim.

The conclusion of the courts below finds support in

Lindley on Mines, 3d Ed. Sec. 618a.

and in the decision of the Supreme Court of California in

Central Eureka M. Co. v. East Central Eureka M. Co., 146 Cal. 147

affirmed in this court in the 204 U. S. 266.

The findings of the Court of Appeals affirming the District Court that there was no intention on the part of the grantor to convey, or on the part of the grantee to acquire, an interest in the Elm Orlu lode claim or any vein apexing therein was amply sustained by the evidence, and we may assume that under well settled rules of this court those findings will not be disturbed.

CONCLUSION.

An examination of the opinion of the trial judge and an examination of the opinion of the Circuit Court of Appeals will show that both courts gave to this case the most painstaking and careful consideration. The conclusions of these courts, living in the mining states, familiar with the mining law, are entitled to the highest respect.

Respectfully submitted,

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